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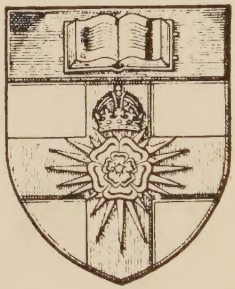

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THE IRISH REPORTS.

1924—Vol. I.

IRISH REPORTS 1894-

REPRINT 1976

Printed and Published
in Great Britain by
Professional Books Limited,
of Milton Trading Estate,
Milton, Abingdon, Oxon.

PB

PROFESSIONAL BOOKS LIMITED

THE IRISH REPORTS

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE CHANCERY DIVISIONS

OF

THE HIGH COURTS OF JUSTICE

AND BY

THE IRISH LAND COMMISSION,

AND ON APPEAL THEREFROM IN

THE COURTS OF APPEAL

IN THE IRISH FREE STATE

AND

IN NORTHERN IRELAND.

EDITOR FOR THE IRISH FREE STATE:

ALBERT D. BOLTON,

BARRISTER-AT-LAW.

EDITOR FOR NORTHERN IRELAND:

T. HENRY MAXWELL,

ONE OF HIS MAJESTY'S COUNSEL.

1924.

VOL. I.

CHANCERY DIVISIONS AND LAND COMMISSION.

DUBLIN:

PUBLISHED BY THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND.

1924.

BIBL. LONDIN. UNIV.

DUBLIN:

PRINTED FOR THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND

At the University Press,

BY PONSONBY AND GIBBS.

Lords Justices of Appeal.

(IN THE IRISH FREE STATE.)

The Right Hon. Stephen Ronan.
The Right Hon. James O'Connor.

Supreme Court.

(IN THE IRISH FREE STATE.)

Hugh Kennedy C.J.
The Right Hon. Charles Andrew O'Connor.
Gerald FitzGibbon.

Lords Justices of Appeal.

(IN NORTHERN IRELAND.)

The Right Hon. William Moore.
The Hon. James Andrews.

Chancery Division.

(IN THE IRISH FREE STATE.)

The Right Hon. Charles A. O'Connor M.R.
James Creed Meredith.
James Augustine Murnaghan.

(IN NORTHERN IRELAND.)

The Hon. Daniel Martin Wilson.

Irish Land Commission.

The Hon. William E. Wylie.

Attorneys-General.

(IN THE IRISH FREE STATE.)

Hugh Kennedy K.C.
John O'Byrne K.C.

(IN NORTHERN IRELAND.)

The Right Hon. Richard Best K.C.

[These Reports will be cited as follows :—[1924] 1 I. R.]

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(IN THE IRISH FREE STATE.)

Courts of Appeal,	C. Lehane, Hugh J. M'Cann,	Barristers-at-Law.
Master of the Rolls,	R. Rice,	Barrister-at-Law.
Chancery Division and Bankruptcy,	C. Norman Kough,	Barrister-at-Law.
King's Bench Division, Nisi Prius, and Probate, and Irish Land Commission,	T. C. Tobias, Hector Hughes,	Barristers-at-law.

(IN NORTHERN IRELAND.)

James M'Connell, Barrister-at-Law.

MEMORANDUM.

The Constitution of the Irish Free State (as set out in the Constitution of the Irish Free State (Saorstát Éireann) Act, 1922 (No. 1 of 1922), and in the Irish Free State Constitution Act, 1922 (13 Geo. 5, Sess. 2, c. 1), Sch. I) provided (Art. 64) for the establishment of a High Court and a Court of Final Appeal, to be called the Supreme Court, and these Courts were established in the Irish Free State by the Courts of Justice Act, 1924 (No. 10 of 1924). By sect. 4 of that Act a High Court of Justice was constituted, consisting of not more than six Judges (namely, a President and five ordinary Judges); and by sect. 5 a Supreme Court of Justice was constituted, consisting of three Judges, of whom the President is to be the Chief Justice of the Irish Free State.

Following this alteration in the judicial system in the Irish Free State, the following Judges retired:—The Lord Chief Justice of Ireland (Right Hon. Thomas Francis Molony), Right Hon. Stephen Ronan (Lord Justice), Right Hon. James O'Connor (Lord Justice), Right Hon. William Houston Dodd, Right Hon. Jonathan Pim, and Right Hon. Arthur Warren Samuels (Justices of the King's Bench Division).

On the 5th June, 1924, the following appointments to the new Courts were announced:—To the Supreme Court: The Attorney-General for the Irish Free State (Hugh Kennedy K.C.) as Chief Justice of the Irish Free State; Right Hon. Charles Andrew O'Connor (formerly Master of the Rolls) and Gerald FitzGibbon K.C. To the High Court: Timothy Sullivan K.C. (President), James Creed Meredith K.C., Right Hon. Thomas Lopdell O'Shaughnessy K.C., The Hon. William E. Wylie K.C., William John Johnston K.C., and James Augustine Murnaghan.

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CASES

DETERMINED BY

THE CHANCERY DIVISIONS

OF

THE HIGH COURTS OF JUSTICE,

AND ON APPEAL THEREFROM IN

THE COURTS OF APPEAL

IN

THE IRISH FREE STATE AND IN NORTHERN IRELAND,

AND BY

THE IRISH LAND COMMISSION.

1924.

IN THE MATTER OF THE ESTATE OF RICHARD MONTESQUIEU BELLEW, DECEASED. BETWEEN PERCY PHILIP O'REILLY AND EDWARD HENRY BELLEW, PLAINTIFFS; AND THE RIGHT HONOURABLE GEORGE LEOPOLD BRYAN, BARON BELLEW, AND THE RIGHT HONOURABLE JENICO EDWARD JOSEPH PRESTON, VISCOUNT GORMANSTON, DEFENDANTS.

(1922. No. 537.)

Powel J. (*I. F. S.*) 1922.

Dec. 13, 14, 15.

1923. Feb. 1.

Appeal.

June 25, 26. July 30.

Settled land—Will—Sale or exchange—Shifting use—Validity of condition—Statute of Limitations—Rule against perpetuities—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *sect.* 51.

A testator devised his S. estate upon trusts, and by his will directed that if the person or any of his sons or their issue entitled to the estates limited by the said trusts should "sell or exchange or concur in or consent to the sale or exchange of all or any part or parts of the D. estate, or any part or parts of the B. estate, the trusts of the S. estate should be void and determined, and that the S. estate should then become vested in Viscount Gormanston absolutely.

The tenant for life of the S. estate entered into agreements with the tenants for the sale of that estate, the agreements being dated 1st May, 1908, and on the 1st November, 1908, as tenant for life (under settlement) of the

Powell J. *(I. F. S.)* 1922.

O'REILLY *v.* BELLEW.

B. estate, entered into agreements with the tenants of that estate for the sale to them of that estate under the Land Purchase Acts. These lands were not vested in the tenants until the year 1921.

On a summons to determine whether, in the events that had happened, the shifting use in the testator's will had taken effect:

Held, by Powell J., that assuming that the shifting use was founded on a valid and enforceable condition, the tenant for life of the S. estate had "consented" to the sale of the B. estate on 1st May, 1908, when the purchase agreements with the tenants of that estate were signed, and that the person entitled on the shifting clause taking effect not having made any claim to the S. estate until more than twelve years after 1st May, 1908, the claim was barred under the Statute of Limitations.

Held by the Court of Appeal (reversing Powell J.), that the Statute of Limitations did not apply, inasmuch as the gift-over did not take effect until the sale under the Land Purchase Acts was completed in 1921 by the signing of the agreements on 1st May, 1908.

Held also, that the condition in the will as to the operation of the shifting clause did not violate the rule against perpetuities, because a sale during the existence of a life estate in S. estate was not void, while a sale not during a life estate would be a sale in defeasance of an estate tail created by the will, and therefore destructible by a disentailing deed.

Held further, that sect. 51 of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), making void any prohibition or limitation against exercise of powers, did not apply, and that Lord Gormanston as residuary legatee and devisee under the will was entitled to the residue of the purchase-money of the S. estate.

ORIGINATING SUMMONS.

By his will, dated the 19th July, 1878, Richard Montesquieu Bellew made certain specific and pecuniary bequests, and devised, bequeathed, and appointed under clause 12 all real and chatted real messuages or tenements (except the lands of Barmeath, given to Charles Bertram Bellew) to the trustees appointed by the will upon trust to pay an annuity of £100 to the testator's nephew, Edward Joseph, Lord Bellew, and subject thereto upon trust to pay the rents and profits of said realty to Charles Bertram Bellew for life, and after his demise upon trust for the first and other sons and issue of the said Charles Bertram Bellew; and in default of such issue upon trust for George Bellew, second surviving son of testator's nephew, Edward Joseph, Lord Bellew, and his issue; and in default of such issue in trust for Richard Eustace Bellew for life, with remainders over. The will contained in clause 21 the following declaration: "I direct and declare that if my said nephew, Edward Joseph, Lord Bellew, or any of his sons or of their issue shall sell or exchange or concur in or consent to the sale or exchange of all or any part or parts of the Dunleer estate sold by me to the trustees of the marriage settlement of my said nephew, Edward Joseph, Lord Bellew, or of all or any part or parts of the house or lands of Barmeath and estate adjoining, in the parish of Dysart, then and in either of the said cases and immediately after such sale or exchange, all and every the devises and bequests hereinbefore contained (subject nevertheless and without prejudice to the exercise of any power contained in this my

will) shall cease and determine and be utterly void, and from and immediately after such sale or exchange as aforesaid I do hereby give, devise, and appoint and bequeath all my said real and personal estates, subject nevertheless to and charged with the payment of my debts and legacies, unto the said Jenico William Joseph Preston, Viscount Gormanston, for his own absolute benefit." The testator appointed the Hon. James O'Brien and the Right Hon. Jenico William Joseph Preston, Viscount Gormanston, executors and trustees of the will. By codicil dated the 29th December, 1879, the testator, in lieu of the bequest of the house and lands of Barmeath made by his will, bequeathed the said house and lands to his nephew, Lord Bellew, his executors and administrators. The testator died on the 8th January, 1880, and probate of his will and codicil was granted on the 17th March, 1880, to Viscount Gormanston. The Hon. James O'Brien filed his renunciation on the 3rd April, 1880. On the death of his father, Charles Bertram Bellew succeeded to the estates left by the will, and died on the 15th July, 1911, without issue. Charles Bertram Bellew had become Baron Bellew on the 28th July, 1895, and on his death without issue he was succeeded by his brother, George Leopold Bellew, who had previously taken the surname of Bryan.

By marriage settlement dated 7th August, 1883, made on the marriage of Charles Bertram Bellew, the demesne and tenanted lands of the Barmeath estate were settled to uses in favour of Charles Bertram Bellew for life, with remainder in default of issue of Charles Bertram Bellew to George Leopold Bryan (previously Bellew) for his life, with remainders over.

The Dunleer estate was purchased by the trustees of the Dowager Lady Bellew's fortune under a settlement dated 7th February, 1853. Under an appointment dated 31st January, 1881, made pursuant to a power in the settlement, the Dunleer estate became the absolute property of Richard Eustace Bellew, third son of Edward Joseph, Baron Bellew, on the death on 11th May, 1904, of Augusta Mary, Baroness Bellew.

Richard Eustace Bellew being absolutely entitled to the Dunleer estate, entered into agreements with the tenants for sale, under the Land Purchase (Ireland) Acts, of a considerable portion of the estate, the purchase agreements being dated the 1st May, 1908. During the years 1919–21 Richard Eustace Bellew also sold by direct sales certain other portions of the Dunleer estate.

Charles Bertram Bellew, as tenant for life of the Shamrock Hill estates, devised by the will of Richard Montesquieu Bellew, entered into agreements with the tenants for the sale of said estate, the agreements being dated 1st November, 1908. As tenant for life under the settlement of 7th August, 1883, he also entered into similar agreements for the sale of the greater portion of the tenanted lands of the Barmeath estate, the purchase agreements (excepting a few of later date) being dated

Powell J. (*I. F. S.*) 1922.

O'Reilly v. Bellew.

1st November, 1908. On the death of Charles Bertram Bellew the proceedings as regards these sales were continued in the name of George Leopold Bryan, Baron Bellew. In the year 1922 these lands were vested in the tenant purchasers, but no vesting order was made as regards the lands of Dunleer.

Jenico William Joseph Preston, Viscount Gormanston, died on the 29th of October, 1907, having by his will (proved on the 27th November, 1907) left his residuary real and personal estate to Jenico Edward Joseph Preston, Viscount Gormanston, one of the defendants.

On the allocation of the purchase-money of the Shamrock Hill estate, the Examiner of Titles raised the question whether the shifting use in the will of Richard Montesquieu Bellew had not taken effect, and notice of the allocation was given to the defendant, Viscount Gormanston.

By agreement it was arranged that the purchase-moneys should be paid to the plaintiffs as trustees for the purposes of the Settled Land Acts, and that a decision should be sought in the Chancery Division.

The following were the questions submitted in the summons :—

1. Whether the shifting use in said will to Jenico William Joseph Preston, Viscount Gormanston, has or has not taken effect?

2. Who is now entitled to the residue of the purchase-money of the Shamrock Hill estate?

G. W. Walker K.C. and *O. Murphy,* for Viscount Gormanston.

A. C. Meredith K.C. and *Hewitt,* for Lord Bellew.

Powell J. :—

This originating summons has been brought to determine the title to the proceeds of the sale of certain lands known as the Shamrock Hill estate, sold by Charles Bertram, Lord Bellew, now deceased, the present owner of which lands is the defendant, George Leopold Bryan, Baron Bellew. On the allocation of the purchase-money the Examiner of Titles raised the question as to whether or not a shifting use in the will of Richard Montesquieu Bellew had taken effect. Notice of the allocation was given to the defendant, Lord Gormanston, who would be the person entitled if the shifting use had taken effect, and is still effective, and the determination of this question was referred to the Chancery Division by Mr. Justice Wylie.

Richard Montesquieu Bellew, by his will dated the 19th July, 1878, devised, bequeathed, and appointed all his real and chattel real messuages, or tenements, farms, lands, and hereditaments, except the lands of Barmeath given to Charles Bertram Bellew, to the trustees named in his will upon certain trusts in the will

declared, including a trust for the payment of an annuity of £100 to his nephew, Edward Joseph, Lord Bellew, for his life, in trust for Charles Bertram Bellew during his life, and after his decease upon certain trusts in favour of his first and other sons, and their issue, which did not take effect by reason of the failure of such issue; and thereupon in trust for George Bellew, the second surviving son of his nephew, Edward Joseph, Lord Bellew, during his life, with subsequent trusts in favour of sons of George Bellew and their issue, and upon failure thereof upon trust for Richard Eustace Bellew during his life, with the subsequent limitations mentioned in the will.

[His Lordship read the clause (1).]

The testator made a codicil to his will dated the 29th September, 1879, which, however, does not affect the matters which I have to determine. He died on the 8th January, 1880, and probate of his will was on the 17th March, 1880, granted to the Right Hon. Jenico William, Viscount Gormanston, one of the executors named in the said will. Upon the death of the testator Charles Bertram Bellew entered into possession of the Shamrock Hill estate, and died on the 15th July, 1911, without issue, and was succeeded by his brother, George Leopold Bellew, who had previously taken the surname of Bryan.

Charles Bertram Bellew during his life entered into agreements for the sale of the greater portion of the Shamrock Hill estate under the Land Purchase Acts, the purchase agreements being dated the 1st November, 1908. As tenant for life under the provisions of a settlement of the 7th August, 1883, he also entered into similar agreements for the sale of the greater portion of the tenanted part of the Barmeath estate, the agreements in this case bearing substantially the same date as the previous agreements.

The proceedings for sale were continued in the name of George Leopold Bryan, and the lands—that is to say, the lands of Shamrock Hill and Barmeath—were last year vested in the tenant purchasers.

Jenico William, Viscount Gormanston, died on the 29th October, 1907, having made his will, probate whereof was on the 27th November, 1907, granted to Georgina, Dowager Viscountess Gormanston, and Gerald Dease, the executors named therein. By his will he bequeathed his residuary real and personal estate to the defendant, Jenico Edward Joseph Preston, Viscount Gormanston.

The lands of Dunleer were held by Edward Joseph, Baron Bellew, under the following title:—Upon his marriage with Augusta Mary Bryan, a minor, a settlement was executed dealing with the lady's moneys under the sanction of the Court. She was entitled to certain moneys, subject to the life interest of her

(1) Ante, p. 2.

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mother, to other moneys absolutely, and also to a sum of £29,324 10s. 9d., subject to the life estate of one Sir John Doyle. These moneys and securities were vested in trustees upon trust to pay Augusta Mary Bellew £500 per annum, to be increased as therein mentioned, and subject thereto to Edward Joseph Bellew during the joint lives of himself and his wife, with remainder to the survivor for life, followed by a power to raise £10,000 as portions for younger children, and a power of appointment among the children vested in the husband and wife or the survivor. The settlement also contained a power to the husband and wife to charge the sum of £29,324 10s. 9d. stock with the sum of £10,000, and a power to invest the trust moneys in lands in Ireland, to be held upon the trusts of the settlement, and a power vested in the trustees, with the consent of Edward Joseph Bellew and his wife, or the survivor of them, to sell the lands so purchased.

In 1856 the lands of Dunleer were purchased by the trustees from the testator with trust funds, and conveyed to them.

By deed dated 31st January, 1881, Edward Joseph Bellew and Augusta Mary Bellew, after reciting that certain trust moneys under the settlement had been called in, that £1,000 thereof was appointed to Edward Joseph, Baron Bellew, £33,195 17s. invested in the purchase of the Dunleer estate, and the balance applied in the purchase of charges and payment of duty, made an irrevocable appointment of £25,000, confirming an appointment made on the 14th August, 1880, but which was revocable, to take effect upon the death of the survivor of them, in favour of Richard Eustace Bellew, to be charged on the Dunleer estate, and appointed the lands to Charles Bertram, afterwards Baron Bellew.

Edward Joseph, Baron Bellew, died on the 28th July, 1895, and Augusta Mary Bellew died on the 17th July, 1904.

In these circumstances, upon the death of Lady Bellew, Charles Bertram, Baron Bellew, became entitled to the Dunleer estate, subject to the charge of £25,000 in favour of Richard Eustace Bellew; and as the lands were of less value than £25,000, the trustees and Charles Bertram, Baron Bellew, conveyed the lands absolutely to Richard Eustace Bellew.

From the year 1855 until his death, in 1895, Edward Joseph, Baron Bellew, was entitled to the income of the lands of Dunleer, subject to the annuity of Lady Bellew. The lands were, however, bought with moneys under a power in a marriage settlement, and were subject to a trust for sale, with the consent of the tenant for life; and it would appear therefore that Edward Joseph, Baron Bellew, was a person deemed to be a tenant for life under sect. 63 of the Settled Land Act, 1882.

Richard Eustace Bellew, being on the 1st May, 1908, absolutely entitled to the Dunleer estate, on that date entered into agreements for the sale of a considerable portion of that estate under the provisions of the Irish Land Act, 1903, but these lands

have not yet been vested in the tenant purchasers. During the years 1919 to 1921 he also sold other portions of the Dunleer estate, consisting apparently of premises in a town, by direct sales to the tenants of these premises, and these are the sales which are relied upon by Lord Gormanston as being breaches of the condition in clause 21 of the will of Richard Montesquieu Bellew.

The terms of this condition are so unusual that counsel on both sides, notwithstanding their great experience, have stated that they have not previously seen one of the same kind. Prima facie it would appear to be a very harsh and unreasonable condition. That persons should be always liable to forfeit an estate devised to them by reason of other persons, over whom they might have no control, doing an act which they had a legal and indefeasible right to do is a condition that seems to me to present features of unreasonableness more pronounced than those contained in conditions which have been held to be void for repugnancy and otherwise. I confess that I would be glad if I could hold it to be void altogether; but I agree with Mr. Walker, and for the reasons which he advanced, that the condition, if otherwise valid, was one which the testator was entitled to impose. Being a condition in a will, I must, of course, in construing it have regard to the intention of the testator so far as that can be done upon a reasonable interpretation of the words used. The words used here indicate clearly that the intention of the testator was to prevent, as far as he could prevent it, the members of the family for the time being entitled to the lands of Dunleer from parting with these lands. He could not, of course, directly impose any condition whatever upon the owner of these lands, but he provided by the condition that Edward Joseph, Lord Bellew, should be penalised if he sold the lands by losing his annuity of £100 given to him by the will; and I have no doubt that he hoped and intended that the condition would have the moral effect of preventing the persons who succeeded Lord Bellew in the Dunleer estate from selling or parting with it. Otherwise the condition would be meaningless—one might almost say cruel. The words he used, I have no doubt, he intended to be exhaustive: "Sell or exchange or concur in or consent to the sale or exchange of all or any part or parts of the Dunleer estate."

One of the matters which I am asked to determine is whether or not the making of the agreement of the 1st May, 1908, by Richard Eustace Bellew was a breach of that condition. If it were a breach, then, assuming the condition to be valid in other respects, the remedy of the defendant, Viscount Gormanston, would appear to be barred by the Statute of Limitations. Mr. Walker, on behalf of Viscount Gormanston, says that it is impossible to say that an agreement for sale of a conditional character is a "sale," or that a man can appropriately be said to "consent to" or concur in his own act. The agreement of the 1st May, 1908, is entitled, "Form of agreement between vendor

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and tenant for sale of a holding," being Form "F" prescribed by the Estates Commissioners for sales under the Irish Land Act, 1903.

Richard Eustace Bellew is throughout the agreement called the vendor. Subject to the estate comprising the holding being sold under the provisions of the Land Act, 1903, all the terms of sale are provided for and determined. The vendor who signs this agreement has done everything that he can do to bring about a sale. To quote the words of FitzGibbon L.J. in *In re Dunalley's Estate* (1): "Any acts subsequently done to carry out that agreement, whether by fiat or vesting order, or by signing more formal documents, will only be acts done to implement the contract which already exists." So that if the question which I had to determine was whether there was a sale when this agreement was signed within the meaning of that word in the condition, I would be inclined to think that there was such a sale. It is not necessary for me so to decide in the present case. But when I am asked to say that there was no consent by Richard Eustace Bellew to a sale, I confess I feel unable so to hold. The word "consent," according to its meaning in the dictionary, includes assent. Can it be said that Richard Eustace Bellew had not "assented" to the sale of the lands mentioned in the agreement of the 1st May, 1908, signed by him? He had done everything in his power to bring about a sale by the only feasible method by which sales of such lands in this country can be effected. I have come to the conclusion that on a fair and reasonable construction of the word "consent," and having regard to the manifest intention of the testator, Richard Eustace Bellew did consent to the sale of part of the Dunleer estate when he signed the agreement of the 1st May, 1908, and that the condition in clause 21 of the will was then broken, and that therefore the claim of Viscount Gormanston is barred. That being my view, it is unnecessary for me to decide the numerous other points raised by Mr. Meredith and Mr. Poole as to the invalidity of the condition or in relation to the application of the Statute of Limitations by reason of the execution of the deed of appointment of 31st January, 1881, by Edward Joseph, Lord Bellew. These points, I need hardly say, have been argued by them on the one side and contested by Mr. Garrett Walker and Mr. Murphy on the other side with characteristic clearness and ability. My opinion on these matters would not be of any assistance to the Court above, and its expression would only add unnecessarily to the length of my judgment. I propose to make the following declaration:—The Court, being of opinion that (assuming the condition in clause 21 to be valid, and without deciding that it is valid) the remedy of the defendant, Viscount Gormanston, is barred by the Statute of Limitations, declare that the defendant, George Leopold, Baron Bellew, is entitled to the residue of the purchase-money of the Shamrock Hill estate.

C. N. K.

(1) [1909] 1 I. R., at p. 359.

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The defendant, Viscount Gormanston, appealed (1), and asked for a declaration that on the true construction of the will of Richard Montesquieu Bellew of July 19th, 1878, and in the events which had happened, the executory limitation contained in the said will of the lands thereby demised and known as "the Shamrock Hill estate," had taken effect, and that the appellant was now entitled absolutely to the residue of the purchase-money, with the dividends accrued thereon, of that estate sold under the Land Purchase Acts.

H. D. Conner K.C. and *G. W. Walker K.C.* (with them *O. Murphy*), for the appellant:—

The condition in clause 21 of the will is valid. It is not bad for (*a*) impossibility, (*b*) illegality, (*c*) remoteness, or (*d*) as being in terrorem, or (*e*) as being an infraction of sect. 51 of the Settled Land Act, 1882. As to (*a*), it is obviously not impossible, though dependent on the volition of a person other than the devisee. As to (*b*), no question of illegality arises; it is not contra bonos mores. It is not repugnant: see Coke upon Littleton, 360, 223; see also Sheppard's Touchstone, p. 130; see further *In re Smith* (2), in which the validity of a similar condition might have been, but was not, relied on. The condition did not in any way interfere with the sale of Shamrock Hill under the Settled Land Acts. In fact, Shamrock Hill has been sold under the Settled Land Acts, and the sale has not been interfered with by the condition. The proceeds of the sale stand in the place of the lands under the Settled Land Acts, 1882, sect. 22, sub-s. 5. The sale of Shamrock Hill is a wholly neutral factor. The present question under the condition would arise on a sale of the Dunleer estate, whether Shamrock Hill was sold or not.

The question of remoteness is conversant with the condition in its relation to the Shamrock Hill estate, and its validity or invalidity depends on whether it may remain a clog or fetter on Shamrock Hill for a period beyond that which the law allows. A sale "by any of the sons of Edward Joseph Bellew" is not remote, because such sale by a son (whether one of the sons living at the date of testator's will, death, or subsequently born) must take place at a time when either a life estate in Shamrock Hill is subsisting in a son or grandson (born in the lifetime of the testator) of Edward Joseph Bellew or an estate tail either in a grandson or after-born son of Edward Joseph Bellew. There is no other alternative. If during a life estate, it is obviously not void; if not during a life estate, at all events, it would be in defeasance of an estate tail created by the will, and therefore destructible by a disentailing deed. Any limitation that is capable of destruction by a disentailing deed is free and immune from any charge of invalidity under the head of remoteness: *Heasman* v.

(1) In the Court of Appeal, before MOLONY C.J., and RONAN and O'CONNOR L.JJ.

(2) [1899] 1 Ch. 331.

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Pearse (1), *In re Huygarth* (2), *Re Harcourt, Portman* v. *Portman* (3); and such before the Fines and Recoveries Act would be the effect of a recovery: *Nicolls* v. *Sheffield* (4).

The simple test of the matter is afforded by the answer to the question: Would a disentailing deed (of the Shamrock Hill estate) executed by a grandson or son of Edward Joseph Bellew discharge the Shamrock Hill estate from the fetter on it caused by the condition? The answer in the affirmative to this question by statute (see sect. 12 of 4 & 5 Wm. 4, c. 92), and in accordance with authorities too elementary and numerous to need citation, is beyond doubt, and indeed has not been questioned.

Prima facie the word "sons" in clause 21 of the will would mean sons taking estates in Shamrock Hill under the will; but if the word "sons" in clause 21 is not so restricted, the class must be ascertained by reference to the actual facts existing at the date of the death of the testator, when his will became operative, and cannot include sons who might have (but in fact did not) come into existence between the date of the will and the date of the testator's death: *Re Powell* (5), Hawkins on Wills, chap. vii. The validity of the condition, so far as concerns the rule against perpetuities, thus depends on its liability to destruction by a disentatiling deed.

The different sections of clause 21 introduced by the disjunctive "or" are severable, though each may be incapable of sub-division: see *Miles* v. *Harford* (6), *Earl of Bandon* v. *Moreland* (7).

The condition does not involve any infraction of sect. 51 of the Settled Land Act, 1882. The voidness under that section arises only in view of an actual transaction or exercise of Settled Land Act powers. It is only void sub modo. The gist of the section and the extent of the avoidance created by it are contained in and expressed by its concluding words, commencing with "so far as," etc. The following cases illustrate this principle:— *Kemp* v. *Haynes* (8), *In re Hazle's Estate* (9), *In re Trenchard* (10), *In re Smith* (11).

In order to make sect. 51 applicable there must be a settlement, a tenant for life or a person having powers of a tenant for life, and an intended exercise of Settled Land Act powers, which the condition would but for sect. 51 interfere with: see *In re Atkinson* (12). *In re Monckton's Settlement* (13) appears to be a strong decision, but the counsel for all the parties concerned argued the case in favour of, or did not oppose the order sought; and the ground of the judgment of Neville J. appears in the concluding sentences of his judgment, to the effect that the settlor, though

(1) 7 Ch. App. 275, at p. 282.
(2) [1912] 1 Ch. 510.
(3) [1921] 2 Ch. 491, at p. 505.
(4) 2 Bro. C. C. 215.
(5) [1898] 1 Ch. 227.
(6) 12 Ch. Div. 691.
(7) [1910] 1 I. R. 220.
(8) 37 Ch. Div. 306.
(9) 29 Ch. Div. 78, at p. 84.
(10) [1902] 1 Ch. 378, at pp. 381, 382.
(11) [1899] 1 Ch. 331.
(12) 31 Ch. Div. 577.
(13) [1917] 1 Ch. 224.

entitled to the settled land in fee, as other estates were or might be let in at his death, his immediate estate was reduced to an estate for life.

It has been suggested that Lord Gormanston's claim is barred by the Statute of Limitations on the ground that it arose on the execution of a deed of appointment dated 31st January, 1881. This was a mere deed of appointment by Edward Joseph, Baron Bellew and his wife of £25,000 in favour of Richard Eustace Bellew, and a direction by them to trustees to raise this charge of £25,000 out of the Dunleer estate "by such ways and means as may be necessary for that purpose." This was at most a direction that the trustees might sell the Dunleer estate for the purposes indicated. No sale was ever made in pursuance of this direction, and it is difficult to understand how the deed referred to could be regarded as a concurrence or consent by Edward Joseph, Baron Bellew, in or to a sale of the Dunleer estate within the meaning of the condition. Conditions of this kind are strictly construed, and it is a strange suggestion that the condition should be enlarged so as to make the appointment "a sale" for the purpose of averting the consequence of a breach of the condition.

It has also been suggested that the forfeiture occurred on the 1st May, 1908, the date of the lodgment of the land purchase agreements in the matter of the Dunleer estate. It was not suggested that the execution of the land purchase agreements constituted a sale by Richard Eustace Bellew, but that it constituted "a consent to a sale"; but it appears impossible to say that an agreement for sale of a conditional character is "a sale," or that a man can appropriately be said to consent to or concur in his own act. Clause 21 in the will of Richard Montesquieu Bellew definitely fixes the time at which the forfeiture is to take effect, namely, "from and immediately after such sale or exchange"; and any action to recover possession of Shamrock Hill or the proceeds of the sale thereof before a completed sale or exchange would be unsustainable and premature. The word "either" is correctly used in clause 21, and the second limb of the sentence shows to demonstration that it means one of the two operations of sale or exchange in each case, with or without the consent mentioned.

Again, a deed of 22nd February, 1909 (after the date of the agreements in which Richard Eustace Bellew posed as absolute owner of Dunleer), has been relied on as a sale, but that transaction had none of the features of a sale, but was a mere conveyance of the legal estate in Dunleer to Richard Eustace Bellew, who was already the virtual owner thereof by reason of being the owner of a charge thereon exceeding the value of the property charged. The effect of this deed would be rather to prevent the necessity for a sale to raise the charge than to constitute in itself a sale within the meaning of clause 21 of the will.

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Jellett K.C., Meredith K.C. (with them *Poole*), for the respondent, Lord Bellew:—

The event in which a shifting clause is to take effect must be accurately described. "Where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards that condition must be such that the Court can see from the beginning precisely and distinctly upon the happening of what event it was that the preceding vested estate was to determine": per Lord Cranworth in *Clavering* v. *Ellison* (1); see also *In re Viscount Exmouth, Exmouth* v. *Praed* (2). Clause 21 of the will in this case is neither precise nor distinct in expression or operation. It is not precise in expression in the words "in either of the said cases," and it is not distinct in operation, as the gift-over is upon sale or exchange only, and none other of the six events mentioned.

Clause 21 is void under sect. 51 of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), and under sect. 52 of that Act the sale by Richard Eustace Bellew would not occasion a forfeiture. A proviso depriving a tenant for life of real estate of certain benefits in personal estate in the event of his "selling" or becoming "disentitled to the possession of" the real estate is void whether contained in the settlement of the real estate or in the will of a person other than the settlor: *Re Ames* (3); *Re Smith, Grose-Smith* v. *Bridger* (4). See *Monckton's Settlement, Monckton* v. *Calder* (5).

This is not a shifting clause relating to estates created by the will. The persons who could do these acts in reference to Dunleer embraced a wider class than those mentioned in the limitations created by the will. Where the limitations of an estate are extrinsic to the settlement containing the shifting clause, if a charge is created the clause does not operate: *Meyrick* v. *Laws, Meyrick* v. *Mathias* (6).

The clause is void as violating the rule against perpetuities. It is not saved from the operation of the rule by the fact that certain sons of Edward Joseph, namely, those born after the testator's death, had estates tail in Shamrock Hill, for (*a*) the "sons" in clause 21 are not coextensive with the sons in clause 12; (*b*) the shifting use is not engrafted on the estates tail. If sons in clause 21 could be read as "said sons," such reading, even if it were possible—which is denied—would not assist Lord Gormanston, because "said sons" would mean sons entitled in possession either for life or in tail to Shamrock Hill, and no such son has ever sold Dunleer or concurred in the sale thereof, unless the conveyance of February 22nd, 1909, by the trustees of the settlement of 1853 and Charles Baron Bellew be a sale within clause 21. If the conveyance of February 22nd, 1909, was a sale, then the forfeiture occurred more than twelve years

(1) 7 H. L. C. 707, at p. 725.
(2) 23 Ch. Div. 158.
(3) [1893] 2 Ch. 479.
(4) [1899] 1 Ch. 331.
(5) [1917] 1 Ch. 224.
(6) 9 Ch. App. 237.

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before the issue of the summons, and Lord Gormanston's right is barred by the Statute of Limitations. If clause 21 is valid, the appointment of January 31st, 1881, to Richard by Edward Joseph of £25,000 charged on Dunleer and funds, and the direction to the trustees by that appointment to raise £25,000 out of Dunleer, followed by the conveyance of February 22nd, 1909, worked a forfeiture by the consent of Edward Joseph to sell, in February, 1909, more than twelve years before the issue of the summons. The agreements for sale of Dunleer of May 1st, 1908, by Richard were a sale, and worked a forfeiture at that date if clause 21 is valid. On that date Richard had done everything he could do to bring about a sale of the property. Put at the lowest, he then consented to sell Dunleer. We rely strongly on *In re Sherlock's Estate* (1), *Huddleston's Estate* (2). Richard's title at the time of the sales relied on by Lord Gormanston, namely, 1919 and 1921, was under the conveyance of February 22nd, 1909, and not under the settlement of 1853.

Conner, in reply:—

It is well settled that where all conditions in defeasance of an estate tail can be destroyed by barring the entail, no objection on the ground of its tending to a perpetuity can be taken to a shifting clause so far as it relates to realty: per Lord Sterndale M.R. in *Portman v. Portman* (3).

July 30.

MOLONY C.J.:—

The summons in this case was brought by the plaintiffs as trustees of the will of Richard M. Bellew, deceased, to determine two questions arising upon the construction of the will of the said deceased, namely:—

1. Whether the shifting use in the said will to Jenico William Joseph Preston, Viscount Gormanston, has or has not taken effect?

2. Who is now entitled to the residue of the purchase-money of the Shamrock Hill estate?

The will of Richard M. Bellew is a very long document, divided into clauses, but this case is concerned only with two clauses, namely, 12 and 21.

By clause 12 the testator, after making certain specific and pecuniary bequests, in exercise of every power enabling him in that behalf, appointed all real and chattel real messuages or tenements, farms, lands, and hereditaments whatsoever and wheresoever (which included the Shamrock Hill estate) to his trustees upon certain trusts thereinafter declared, including a trust for the augmentation of his general personal estate and the payment of an annuity of £100 to his nephew, Edward Joseph,

(1) [1899] 2 I. R. 561, 591, at pp. 606 and 608. (2) [1921] 1 I. R. 1.
(3) [1921] 2 Ch. 491, at p. 505.

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Lord Bellew, for his life, and subject and without prejudice thereto to pay all the rents and profits of the said real property in trust for Charles Bertram Bellew during his life, and after his decease upon certain trusts in favour of his first and other sons and their issue, which never took effect by reason of the failure of such issue, and thereupon in trust for George Bellew, the second surviving son of his nephew, Edward Joseph Bellew, during his life, with subsequent trusts in favour of the sons of the said George Bellew and their issue, and upon failure thereof in trust for Richard Eustace Bellew during his life, with subsequent limitations as in the said will mentioned.

Clause 21 is in the following terms. [His Lordship read the clause (1).]

Charles Bertram, Lord Bellew, being the tenant for life of the Shamrock Hill estate under the will of the said Richard M. Bellew, entered into agreements for the sale of the greater portion thereof under the Land Purchase Acts, and upon his death the proceedings for sale were continued by George Leopold Bryan, Baron Bellew, the present defendant. The sales have now been carried out, and the balance of the purchase-money has been transferred to the plaintiffs on their undertaking to hold same pending the decision of the Court as to who is entitled thereto. Richard Eustace Bellew, who, in the events which happened, claimed to be absolutely entitled to the Dunleer estate, entered into agreements under the Land Purchase (Ireland) Acts for the sale of a considerable portion of that estate to the tenants thereon. The purchase agreements were dated 1st May, 1908, but the lands were not declared an estate until the 19th of June, 1922; and on the 8th March, 1923, the lands were vested in the tenants by fiat, and an order was made paying the purchase-money into the bank.

It was contended by Lord Gormanston that the result of this sale was that he, as the residuary legatee and devisee of his father, Jenico William Joseph Preston, Lord Gormanston, became entitled to the Shamrock Hill estate and the proceeds of the sale thereof under clause 21 of the will of the testator. When the matter came before Mr. Justice Powell it was in the first instance contended on behalf of Lord Bellew that, assuming that the shifting clause was good, it came into operation on the signing of the agreements on the 1st May, 1908, and more than twelve years having elapsed since that date, the Statute of Limitations was a good defence, and that the claim of Lord Gormanston was barred. Mr. Justice Powell acquiesced in this view, and by his order of the 1st February, 1923, he stated that the Court was of opinion that, assuming the condition contained in clause 21 of the will to be valid, and without deciding that it was valid or invalid, the remedy of the defendant, Viscount Gormanston, in respect of the purchase-money of the Shamrock Hill estate was barred by the provisions of the Statute of Limitations; and he accordingly held

(1) Ante, p. 2.

that the defendant, Lord Bellew, was entitled to the residue of the purchase-money of the Shamrock Hill estate for his life, with remainder over, as in the said will mentioned.

From this order the defendant, Viscount Gormanston, appealed, and the case has been argued with great force and ability by Mr. Jellett and Mr. Meredith on behalf of Lord Bellew, and by Mr. Garrett Walker and Mr. H. D. Conner on behalf of Lord Gormanston.

It is clear that time would not run against Lord Gormanston until the gift-over to him had taken effect. The words of clause 21 deal with the possibility of Edward Joseph, Lord Bellew, or any of his sons or their issue doing any of six things: (*a*) sell, (*b*) exchange, (*c*) concur in an exchange, (*d*) consent to an exchange, (*e*) concur in a sale, (*f*) consent to a sale. Mr. Justice Powell held that Richard Eustace Bellew consented to the sale of the Dunleer estate when he signed the agreements of the 1st May, 1908, and that the condition in clause 21 of the will was then broken, and that therefore the claim of Viscount Gormanston was barred. He, however, did not pay sufficient attention to the words of the gift-over, which was only to take effect upon the sale or exchange.

It is quite clear that an agreement to sell under the Land Purchase Acts is regarded as a sale for certain purposes, such as the allocation of the bonus; but if the contention of Lord Bellew is correct, the gift-over would take effect even though the sale, for any reason, was never carried out. It seems to me that the clause is carefully drafted, with the object and intention that the gift-over should not take effect immediately on a consent to or concurrence in a sale, but only after the sale or exchange had been actually carried into legal effect; and as the sale was only completed and the purchase-money brought to credit last year, the Statute of Limitations does not affect the matter. It has, however, been contended that, apart from the sale through the Irish Land Commission, there was a previous disposition of the Dunleer estate, which, within the meaning of clause 21, worked a forfeiture of the estate in February, 1909—more than twelve years before the issue of the summons in the present case. In order to understand this contention, it is necessary to refer shortly to the title of the estate. Under an indenture dated the 7th day of February, 1853, made between Patrick Baron Bellew of the first part, Margaret Bryan of the second part, Edward Joseph Bellew of the third part, Augusta Mary Bryan of the fourth part, Arthur James Plunkett and John Lewis O'Ferrall of the fifth part (being a settlement made in contemplation of the marriage then intended and shortly afterwards solemnized between the said Edward Joseph Bellew and Augusta Mary Bryan), certain stocks, funds, and securities were put in settlement upon trust for the husband for life, with remainder to the wife for life, and with remainder to the children as the husband and wife should appoint, and in default of

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appointment equally. The lands of Dunleer were purchased by the trustees of the settlement from Richard M. Bellew for £33,195, portion of the trust funds, and were held by them subject to the trusts. There were four children of the marriage; and by deed poll dated 31st January, 1881, the husband and wife jointly appointed £25,000 to their son Richard Eustace Bellew, and charged same on the Dunleer estate, and gave power to the trustees to raise and pay the said sum thereout; but the appointment was not to take effect until after the death of both husband and wife. And by the same deed the husband and wife appointed the residue of the trust funds to another son, Charles Bertram Bellew. The wife survived the husband, and died in 1904, and thereupon the charge became raisable. In the meantime, however, the value of the estate had depreciated so much that it was not worth the £25,000; and Richard Eustace Bellew was allowed to enter and take possession as being the only person beneficially interested in the estate. In 1909 it was considered right to regularize his position, and by indenture of the 22nd February, 1909, the then trustees of the settlement, with the concurrence of Charles Bertram, then Baron Bellew (the appointee of the residue of the trust funds), conveyed the lands to him in satisfaction of his charge. If this was a sale within the meaning of clause 21, Lord Gormanston would now be barred; but I am of opinion that this transaction was not within the scope of the clause. The object of the clause was to prevent the Dunleer estate passing away from the Bellew family. The effect of the deed was effectually to vest the estate in the chargeant, a member of the family, and to obviate the necessity for raising the amount of the charge by a forced sale. Richard Eustace Bellew took the estate in satisfaction of his charge, as he was manifestly entitled to do. In considering whether the deed of the 22nd February, 1909, worked a forfeiture, we have to ask ourselves the simple question: has the event contemplated by the testator happened? See *Meyrick* v. *Lawes* (1); and, to the same effect, *Harrison* v. *Round* (2), *Gardiner* v. *Jellicoe* (3). Applying this test, I am satisfied that this conveyance was not a sale within the meaning of clause 21, and did not work any forfeiture.

Assuming, however, that the Statute of Limitations did not apply, it has been strongly contended that the shifting clause is void and inoperative, (*a*) as violating the rule against perpetuities and (*b*) under sect. 51 of the Settled Land Act, 1882.

In the consideration of this question I put aside at once the arguments which have been addressed to us based on the assumption that the state of circumstances at the date of the testator's will is to be considered. It is clear, from a long series of authorities, that in deciding the question of remoteness the state of circumstances at the date of the testator's death, and not their state at the date of the will, is to be regarded. It is unnecessary

(1) 9 Ch. App. 237, per Lord Selborne, page 243.

(2) 2 De G. M. & G. 190.

(3) 12 C.B., N.S., 568, 637.

to refer to the authorities, which will be found collected in Jarman on Wills, 6th ed., vol. i, p. 300, because, as Jessel M.R. says in *Hale* v. *Hale* (1): "The doctrine on the subject is perfectly well settled. A will takes effect at the death of the testator, and any gift made by it is void for remoteness if it does not necessarily take effect within twenty-one years from the termination of any life then in being." I am satisfied that a sale by any of the sons of Edward Joseph Bellew is not a violation of the rule, because such a sale by a son must take place at a time when either a life estate in Shamrock Hill is subsisting in a son or grandson (born in the lifetime of the testator) of Edward Joseph Bellew, or an estate tail either in a grandson or afterborn son of Edward Joseph Bellew. If a sale takes place during the existence of a life estate in Shamrock Hill, it is obviously not void, and if not during a life estate, it would be a sale in defeasance of an estate tail created by the will, and therefore destructible by a disentailing deed. There is no doubt but that limitations taking effect on the determination or in defeasance of an estate tail are not too remote—*Hearsman* v. *Pearse* (2); *Re Haygarth, Wickham* v. *Holmes* (3); *Re Harcourt, Portman* v. *Portman* (4)—and the reason is that the tenant in tail can now destroy such limitations by barring the entail—Fines and Recoveries (Ireland) Act (4 & 5 Wm. 4, c. 29), sect. 12—just as at Common Law he could have done by suffering a recovery—*Nicolls* v. *Sheffield* (5).

I am therefore satisfied that the condition is not void for remoteness, and, notwithstanding the powerful argument which was addressed to us by Mr. Jellett, I think the condition does satisfy the six requisites succinctly stated in Halsbury, vol. xxii, p. 302, in the excellent treatise on perpetuities contributed by Sir Plunket Barton.

I next have to deal with the question raised on sect. 51 of the Settled Land Act of 1882. That section is as follows:—

"If in a settlement, will, assurance, or other instrument executed or made before or after, or partly before and partly after, the commencement of this Act a provision is inserted purporting or attempting, by way of direction, declaration, or otherwise, to forbid a tenant for life to exercise any power under this Act, or attempting, or tending, or intended, by a limitation, gift, or disposition of other real or any personal property, or by the imposition of any condition, or by forfeiture, or in any other manner whatever, to prohibit or prevent him from exercising, or to induce him to abstain from exercising, or to put into a position inconsistent with his exercising any power under this Act, that provision, as far as it purports or attempts or tends or is intended to have, or would or might have the operation aforesaid, shall be deemed to be void."

This section is very wide, but its meaning has been the subject of several decisions, and may now be said to be well understood.

(1) 3 Ch. D. 643, at p. 645.
(2) 7 Ch. App. 275, 282, 283.
(3) [1912] 1 Ch. 510.
(4) [1921] 2 Ch. 491, 505, 509, 514; [1922] 2 A. C. 473.
(5) 2 Browne's Chancery Cases, 215.

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Lord Selborne C., in *Re Hazle Settled Estates* (1), thus states its effect: "I think the object of that section is to strike at and defeat (so far as they might control the powers given by the Act) all provisions, even though contained in existing settlements, which might in their intention and substance be prohibitory, obstructive, or penal, for the purpose of preventing alienations or other acts contemplated by the statute."

Again, in *Re Smith, Grose-Smith* v. *Bridger* (2), North J. thus states the effect of the section in reference particularly to settlements which were executed before the passing of the Act: "At the time those instruments were prepared the law allowed a man to tie up land during the life of a tenant for life. Sometimes a settlor gave a tenant for life a power of sale; sometimes such power of sale was given with limitations; and frequently a tenant for life had no power of sale; and so long as an estate was held by a tenant for life, and there was no power of sale, that estate was not alienable. The Legislature, however, considered that the then state of the law in this respect was a public disadvantage, and ought to be altered. For the purpose of accomplishing that object the power to sell has been given to tenants for life by statute, and as it would have been of no use to give that power by the hand of the Legislature, if it were allowed to be inferentially taken away by the hand of a private person, the Legislature not only gave the power of sale, but went the length of framing what I concur with Mr. Daniel Jones in thinking is a very strong provision, and provided that if any attempt was made to induce a tenant for life not to sell, or any benefit was attempted to be taken away from him on a sale taking place, such attempt was to be ineffectual, and he was to be in the position of having the same interest as he would have had if the sale had not taken place. I think the present case is within the enactment."

In *Fitzgerald, deceased, Brereton* v. *Day* (3), the section was further considered by Sir A. M. Porter M.R., who, quoting the section and referring to the authorities up to that time, said: "The policy of the Act is that the tenant for life is to have full power to sell the settled land, and any condition imposed to prevent his exercising this power is not only inapplicable to the settled land, but is to be deemed void, that is to say, is inapplicable to any other property to which the condition is attached." In the present case there was no fetter whatever on the exercise by Lord Bellew of his powers as tenant for life of the Shamrock Hill estate, and he has in fact sold the estate under the provisions of the Act. Any such fetter would be void, whether contained in the settlement itself—*Re Fitzgerald, Brereton* v. *Day* (3)—or in an instrument different from that under which the tenancy for life in the settled land was created—*Re Smith, Grose-Smith* v. *Bridger* (2). But here the cesser of the estate does not depend

(1) 29 Ch. Div. 78.
(2) [1899] 1 Ch. 331.
(3) [1902] 1 I. R. 162.

on the volition of the tenant for life, but on the happening of an event which he is powerless to control. An attempt has been made to show that the case of *Monckton's Settlement, Monckton* v. *Calder* (1), is of importance in dealing with the present case; but I am unable to see its application. All it decides is that although a man may be entitled under the words of a settlement to the settled land in fee, yet if other estates are or may be let in at his death, he may be regarded as a tenant for life within the meaning of sect. 2, sub-s. 5, of the Settled Land Act, and capable of exercising all the powers of a tenant for life under the Act. This, however, has no bearing either on Lord Bellew's tenancy for life in the Shamrock Hill estate or Richard Eustace Bellew's estate in fee in the Dunleer estate, or the proceeds of the sales of these estates respectively.

I am therefore satisfied that sect. 51 has no application, and I am forced to the conclusion that the order of Powell J. must be discharged, and in lieu thereof declare that the shifting use in the will of Richard M. Bellew, deceased, to Jenico William Joseph Preston, Viscount Gormanston, has taken effect, and that the defendant, Viscount Gormanston, as residuary legatee and devisee under the will of the said Jenico William Joseph Preston, Viscount Gormanston, is now entitled to the residue of the purchase-money of the Shamrock Hill estate.

RONAN L.J.* :—

I have had the advantage of reading the judgment of the Lord Chief Justice, and I concur in it. As, however, the case has been so carefully and elaborately argued, I should like to make a few observations on some of the points raised by counsel. Mr. Justice Powell's judgment proceeded on the assumption that the shifting clause was a good clause; and on that assumption he decided that the Statute of Limitations was a good defence. He held that the condition in clause 21 of the will was broken when Richard Eustace Bellew signed the agreement of May 1st, 1908, with the Land Commission. That question depends upon the words of the clause. The words in the clause are that the devises and bequests mentioned "shall cease and be utterly void from and immediately after such sale or exchange." Do these words mean agreement for sale or exchange, or the completion of the transaction? It was vigorously argued that they meant agreement for sale, and that as that took place more than twelve years before the issue of the summons, the Statute of Limitations applied. Mr. Meredith relied specially on the judgment of this Court in *Huddleston's Estate* (2). In that case the question was, who was the vendor for the purpose of receiving the bonus? and the majority of the Court held that the crucial date for ascer-

* This judgment has not been revised by Ronan L.J.

(1) [1917] 1 Ch. D. 224. (2) [1921] 1 I. R. 1.

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taining the right to the bonus was the date of the agreement for sale. It was to my judgment Mr. Meredith addressed himself. I referred to the various meanings in which the word "sold" was used in the Act of 1903, and I said: "'Time of sale' may mean the date of the commencement of the sale, or the date of the completion, or the whole period between the two, or any particular part of that period indicated in a particular provision, for sect. 24, sub-s. 1, of the Act of 1903 says: 'In the case of the sale of an estate . . . so soon as the holding is vested in the purchaser.' This plainly means when this stage of the sale is reached. The first sentence in Williams' Vendors and Purchasers is an apt illustration of this: 'The subject of the present treatise is the sale of real estate, or the formation and completion of contracts for the conveyance of land in consideration of a price in money.'" It seems to me that for the reasons stated by the Lord Chief Justice it is absolutely plain that "sale" in the will before us means completed sale.

Another point on the Statute of Limitations which does not appear to have been raised before Powell J. was made before us. It was submitted that if clause 21 was valid, the appointment of January 31st, 1881, to Richard by Edward Joseph of £25,000 charged on Dunleer, and the direction to the trustees by that appointment to raise £25,000 out of Dunleer, followed by the conveyance of February 22nd, 1909, worked a forfeiture on that date, more than twelve years before the issue of the summons. The Dunleer settlement was not a settlement of lands at all. It was a settlement of a trust fund, part of which was invested in the Dunleer estate, and, of course, the limitations of the estate are determined by the trusts of the fund. The law is settled that, "speaking generally, where . . . the limitations of the estate are extrinsic to the settlement containing the shifting clause, if a charge is created (for a charge is just as much taken from the estate as if a portion of the estate were taken from it) the clause will not operate": per Lord St. Leonards in *Harrison* v. *Round* (1). He also says: "Then it is said that the terms of the proviso are such as require a very strict construction, and I agree that provisos of this sort, which are to defeat an estate, are not to have an unnatural or an unnecessarily enlarged construction put upon them. As, however, the party who creates the estate has also a right to limit it over or to defeat it, a fair construction ought to be given to the words which he uses for that purpose." That seems to me to be the real principle to apply to cases of this kind. In the words of Lord Selborne in *Meyrick* v. *Laws* (2): "The simple question is, has the event contemplated by the testator happened?" Carrying out the trusts of the Dunleer settlement was not an event contemplated by this clause. I am therefore satisfied that the question of the Statute of Limitations is wholly out of the case.

(1) 2 De G. MacN. & G. 190, at p. 203. (2) 9 Ch. App. 237, at p. 242.

It was contended that clause 21 was invalid as violating the rule against perpetuities. Mr. Jellett's point was that nephews of the testator born between the date of the will and his death were not mentioned. It is settled law that in applying the rule against perpetuities the state of things existing at the testator's death, and not at the date of the will, is to be looked at: Theobald on Wills, 7th ed., p. 600. The clause does not infringe the rule against perpetuities.

The words in clause 21 are quite unlike the words in an ordinary shifting clause. In this clause everybody's rights under the settlement are swept away in the event of a sale or exchange of the lands in question. Mr. Jellett relied with great vigour on the case of *Meyrick* v. *Laws* (1), but that case is wholly different. If one of the parties in that case became entitled in possession, his estate was to cease. In this case there is no such limitation.

For these reasons I think the appeal ought to be allowed.

MOLONY C.J.: I am authorized by Lord Justice O'Connor to state that he concurs.

Solicitors for the appellant: *Beauchamp & Orr.*
Solicitors for the respondent: *A. O'Hagan & Son.*

C. L.

(1) 9 Ch. App. 237.

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Nov. 1.
Nov. 8

ROBERT FERGUSON & CO., Ltd., *v.* JANE FERGUSON (1).

(1923. No. 38.)

Lease — Forfeiture — Liquidation — Relief against forfeiture — "Lease of agricultural or pastoral land"—Sale within a year of forfeiture—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *sect.* 14, *sub-ss.* 1, 2, 6; *Conveyancing Act,* 1892 (55 & 56 *Vict. c.* 13), *sect.* 2, *sub-ss.* 2, 3.

R. F. & Co., the appellants, lessees of thirty-seven acres and a half of land in the County of Antrim, on which a factory and certain other buildings were erected, went into liquidation, and thereby incurred a forfeiture for breach of covenant in the lease. The liquidator, in order to obtain relief against the forfeiture under sect. 14, sub-ss. 1, 2, 6, of the Conveyancing Act, 1881, and sect. 2, sub-ss. 2, 3 (*a*), of the Conveyancing Act, 1892, entered into a conditional contract for sale within one year from the date of the liquidation.

In an action by R. F. & Co., Ltd., claiming that the defendant was not entitled to enforce a right of forfeiture:

Held by the Court of Appeal, N.I. (Moore and Andrews L.JJ.), affirming Wilson J., that notwithstanding the demise of the factory and machinery, the lease was a lease of agricultural land within the meaning of sect. 2, sub-s. 2, of the Conveyancing Act, 1892 (55 & 56 Vict. c. 13), and that accordingly that sub-section did not apply to the lease. *Held* also, that a sale within sect. 2, sub-s. 3 (*a*), of the Conveyancing Act, 1892, must either be completed by conveyance or be an absolute contract for sale.

Action claiming that the defendant was not entitled to enforce a forfeiture for breach of covenant in a lease.

By a lease dated November 12th, 1917, the defendant, Jane Ferguson, demised to the plaintiffs, Robert Ferguson & Co., Ltd., thirty-seven acres and two roods of the lands of Slatt, in the Barony of Antrim Lower, and County of Antrim, for a term of fifty years at the yearly rent of £150, payable half-yearly. The proviso for re-entry was in the following terms: "Provided that if the said yearly rent of £150 or any part thereof shall be in arrear for the space of thirty days . . ., or, if the company shall enter into liquidation, whether compulsory or voluntary, it shall be lawful for the lessor at any time thereafter into and upon the demised premises or any part thereof in the name of the whole to re-enter, and thereupon the said term hereby created shall absolutely determine." The lessees entered into possession, and carried on their business on the premises.

The defendant was a member of the plaintiff company, and held certain shares therein, jointly with other members of her family. On 11th April, 1922, an extraordinary general meeting of the plaintiff company was held, and a resolution was duly passed to wind up the company voluntarily, and appointing Mr. Hugh Boyd as liquidator for such purpose.

(1) In the Court of Appeal (N.I.), before Moore and Andrews L.JJ.

The company was a private company, consisting of the defendant and the members of her family. After the execution of the lease the defendant and other members of her family continued to reside in the dwelling-house on the demised premises, and to work portion of the land, without paying any rent to the company.

On 20th October, 1922, the liquidator gave notice to the defendant of his intention to offer the demised premises for sale by public auction, and demanded from the defendant clear possession of the dwelling-house and premises.

On 3rd November, 1922, the defendant's solicitors replied to the notice stating that the defendant declined to give up possession, but making no reference to the intended sale. On 23rd November, 1922, the plaintiff company issued a writ for recovery of the premises, and on 17th January, 1923, judgment for recovery thereof was entered by the plaintiffs in default of appearance.

On 9th February, 1923, a notice by the defendant and by Albert L. M'Clelland and Joseph Ferguson was served upon the liquidator and the company, alleging that by an indenture dated 18th November, 1920, all the estate and interest of the defendants under the lease had been assigned to and become vested in the said Albert L. M'Clelland and Joseph Ferguson, and, further, alleging that the plaintiffs had not paid the rent reserved by the said lease, and that the sum of £900 was then due for such rent, and that the company had accordingly committed a breach of the covenants in the said lease, and, further, that the company had entered into liquidation, and thereby committed a breach of the said covenant; and requiring the company and the liquidator to remedy the said breaches in so far as the same might be remedied, and to pay the sum of £900 for arrears of rent, and also compensation for the breach of covenant against liquidation; but they contended that this last-mentioned breach was not legally capable of being the subject of monetary compensation. The plaintiffs claimed a declaration that the defendant was not entitled to enforce the right of re-entry or forfeiture contained in the lease; or, in the alternative, relief against such right of re-entry or forfeiture, upon such terms as the Court should deem just.

On 12th February, 1923, the liquidator offered the premises for sale by auction, and the same were sold to Samuel M'Cord for the sum of £3,500, and an agreement for purchase was duly signed by the purchaser subject to conditions of sale, one of which provided for rescission of the sale in the event of the plaintiff company and the liquidator not being relieved by the Court from any forfeiture.

Wilson J. held that the lease of 12th November, 1917, notwithstanding the demise of the factory and machinery, was a lease of agricultural or pastoral lands within the meaning of sect. 2, sub-s. 3 (*a*), of the Conveyancing Act, 1892, and that therefore the plaintiffs were not entitled to the relief sought.

Appeal. (*N. I.*) 1923

FERGUSON & Co. *v.* FERGUSON.

The plaintiffs appealed to the Court of Appeal of Northern Ireland (1).

Babington K.C., *Macafee K.C.*, and *Lowry*, for the plaintiffs:—

The breach relied on was that incurred by the company going into voluntary liquidation. Under the Conveyancing Act, 1881, the Courts were given power to grant relief against forfeiture in certain circumstances. Wilson J. refused the relief asked, holding that the lease was one of agricultural land. This is a lease of a factory for the purpose of carrying on the business of the company. We submit that this is not a lease of agricultural land within the meaning of sect. 2, sub-s. 3 (*a*), of the Conveyancing Act, 1892. It was a lease of a factory, not of a farm. The company was a private one; all the shares were held by the family, consisting of the defendant, her two sons and three daughters. The two sub-ss. 1 and 2 of sect. 14 of the Conveyancing Act, 1881, are difficult to construe; under sub-s. 1 the lessor may serve notice specifying the particular breach complained of. Sub-s. 2 gives certain rights to the lessee. This last sub-section gives the Court the widest possible discretion. The effect of sect. 2, sub-s 2, of the Conveyancing Act, 1892, is that during the year the lessor can only exercise his right of forfeiture after serving notice, but the lessee cannot get relief unless he sells within one year: *Horsey Estate, Ltd.*, v. *Steiger* (2). We submit that a lease of agricultural or pastoral land must be one in which the land was leased for the purpose of agriculture or pasture. This is a lease of a weaving factory with some acres of land attached. The true character of a lease is dependent on whether or not the agricultural or pastoral lands predominate. It is inequitable for the defendant to rely on the forfeiture. She allowed the ejectment to go by default, and did not send notice of the forfeiture until ten months after it had occurred. The Court should lean towards relieving against forfeiture. There was a bona-fide sale to a solvent purchaser. There is very little authority to be found. The cases all seem to be cases of breaches of covenant to repair, or cases where there was no sale within a year. In *Rose* v. *Spicer* (3), and *Hyman* v. *Rose* (4), the Courts considered the principles on which relief against forfeiture will be granted. In the latter case Earl Loreburn C., at p. 631, lays down the principles affecting the giving of such relief. The Conveyancing Act, 1892, was passed to benefit lessees, and to extend the right to relief granted by the Act of 1881. The Court must take all the circumstances into account. We submit that sale within the meaning of sect. 2, sub-s. 2, of the Conveyancing Act, 1892,

(1) In the Court of Appeal, before MOORE and ANDREWS L.JJ.

(2) [1899] 2 Q. B. D. 79. (3) [1911] 2 K. B. 234. (4) [1912] A. C. 623.

means a sale at a public auction. If anything other than a contract of sale was contemplated, it would be impossible to carry it out within a year. *Re Henry Castle & Sons, Ltd., Mitchell* v. *Castle & Sons, Ltd.* (1), was a case of a non-bona-fide sale. On the general merits there is no answer to our case.

Murphy K.C., Megaw K.C., and *McCutcheon,* for the defendants:—

The evidence shows that the land was worked as a farm in the ordinary rotation of crops. Questions of equity do not enter into the construction of an Act of Parliament. There is a plain distinction between the Land Acts and the Conveyancing Acts. The Land Acts have no bearing on the words that this Court is asked to construe, and no such expression as "holding" is found in the Conveyancing Acts. There is no "sale," unless it has been completed by conveyance, or an absolute contract has been entered into: *Re Henry Castle & Sons, Limited, Mitchell* v. *Castle & Sons, Limited* (1). A sale conditional in form cannot be a "sale" within the Conveyancing Act, 1892: *Civil Service Co-operative Society, Limited,* v. *Trustees of Sir J. R. D. M'Grigor, Bart.* (2). We submit that this is not a case in which the Court should exercise its discretion to grant relief. The creditors can have no rights superior to the rights of the company. They must be presumed to know the nature of the company. In *Ewart* v. *Fryer* (3), it was held that the voluntary liquidation of a lessee company had occasioned a forfeiture of the original lease. In *Hyman* v. *Rose* (4), the lessees offered conditions of obtaining relief. In the present case, no single term has been offered, good, bad, or indifferent. We submit that we are entitled to the covenants of a solvent lessee, and that Wilson J. was right in saying that no sufficient grounds for relief had been pleaded or proved.

Cur. adv. vult.

Nov. 8.

MOORE L.J.:—

I formed a very clear view during the argument of this case, and it is not necessary now that I should say much.

Mrs. Jane Ferguson, on 12th November, 1917, made a lease to the plaintiff company of 37 acres 2 roods of the lands of Slatt, situate in the County of Antrim, with the factory, houses, buildings thereon, and water power, for a term of fifty years, at the yearly rent of £150. It was inter alia provided by this lease that if the plaintiff company should thereafter enter into liquidation, whether compulsory or voluntary, it should be lawful for the lessor to re-enter upon the premises, and that thereupon the term created should absolutely determine.

The shareholders in the company consisted solely of the lessor

(1) 94 L. T. R. 396.
(2) [1923] 2 Ch. 347.
(3) 1901] 1 Ch. 499.
(4) [1912] A. C. 623.

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and her sons and daughters. On the 11th April, 1922, after nearly five years' trading, pursuant to resolution, the company went into voluntary liquidation. Mr. Hugh Boyd was appointed liquidator; and in order to realize the effects of the company he put the premises under the lease up for sale by auction, and same were provisionally sold to Mr. Samuel M'Cord for £3,500, the provisional element being relied upon in these proceedings. The lessor served notice on 9th February, 1923, purporting to determine the lease under the proviso for re-entry on the liquidation of the company, which, if lawful, left the liquidator nothing to sell so far as the leasehold interest was concerned.

The present action is brought to restrain the defendant from determining the lease, or, alternatively, for relief on conditions. Reading the statement of claim, it appears that some sort of equity is claimed against the defendant by reason of the fact that being lessor she was also a shareholder in the company which became lessee; but this was not persisted in at the hearing before us, and in my view rightly not. At the same time I take leave to say that notwithstanding the law as to the status of incorporated companies as distinguished from their shareholders, I think it is not a meritorious course of conduct for this lady, having been so largely concerned in a limited concern which has defaulted to the extent of £30,000, to rely on her rights as lessor in order to defeat the claims of the other creditors of the company, the company consisting of herself and her family; but if the law permits her to do so, this Court cannot interfere.

There is no doubt, any equitable case against her having disappeared, that she can determine the lease under the foregoing proviso for re-entry, unless she is prevented by the operation of the Conveyancing Act of 1881, sect. 14, as extended by the amending Act of 1892. Therefore the first question is: do these Acts, or any of them, apply? Sect. 2, sub-s. 2, of the amending Act of 1892 for the first time gave a lessee company in a liquidation relief under the Act of 1881, sect. 14, subject to two qualifications: 1 (here of importance), that the relief is to apply only within twelve months after the liquidation; and, 2, only where within that time the lessee's interest has been sold. Sect. 2, sub-s. 3, however, excludes altogether a lease of agricultural or pastoral land from the operation of the last-mentioned sub-section. Is the present lease a lease of agricultural land within the meaning of the sub-section? I agree with counsel on both sides that the clause is somewhat difficult to construe. Mr. Babington has urged on us two considerations: (*a*) that a lease of agricultural land (I omit "pastoral") means a lease of agricultural land exclusively, and therefore that the inclusion of the factory premises in the present lease prevents the lease being regarded as a lease of agricultural land; (*b*) that if this contention be not correct, the meaning of the section is a lease of lands of which the main or substantial purpose was

agricultural, and that in the present case the main or substantial purpose was for the use of the factory, and that the lease is therefore not to be regarded as a lease of agricultural land within the true meaning of this sub-section.

Giving the matter the best consideration I can, I am of opinion that (*a*) fails. I can find nothing in words or by implication in either statute to suggest that the lease must be of agricultural land exclusively. I think that (*b*) also fails. I can find nothing in words or by implication in either statute to suggest the idea that the main or substantial purpose of the letting, as apart from the nature or quality of the lands demised, is to be considered. I therefore think as regards (*b*) that decisions under our Irish Land Acts have no application. There "the character" of the holding was in question. No authorities on the precise construction of the sub-section of the Act of 1892 on this point have been cited to us. There remains only a third alternative, which gives the words their natural and prima facie meaning, which I am accordingly driven to adopt, viz., that a lease of any agricultural or pastoral land, irrespective of whether or not it includes other non-agricultural or non-pastoral lands or buildings, is what the section was intended to include. I am far from holding that the principle of de minimis may not be used in construction in a proper case under sect. 14 as amended by the Act of 1892, but no one could say that it applied in the present circumstances, where thirty-seven and a half acres, only less the mill site and surroundings, were steadily farmed.

This conclusion is really sufficient to dispose of the case; but as there has been a good deal of argument upon the effect of sect. 2, sub-s. 2, "provided the lessee's interest be not sold within one such year," I think I should also give my opinion on that. I think "sold" there means either conveyed or transferred as the result of a contract for purchase and sale, or at any rate that the expression "sold" does not apply to a conditional agreement for sale and purchase, such as that in the present case. I base this opinion on the definitions of "purchaser" and per contra of "sale" in the Conveyancing Act of 1881, sect. 2, sub-s. viii. This sub-section is as follows:—

> "Purchaser, unless a contrary intention appears, includes a lessee or mortgagee, and an intending purchaser, lessee, or mortgagee, or other person who, for valuable consideration, takes or deals for any property; and purchase, unless a contrary intention appears, has a meaning corresponding with that of purchaser; but sale means only a sale properly so called."

I am glad that by so deciding we can observe the comity of Courts, including Courts of first instance, by agreeing with the views already expressed on this question in England by Joyce J. in *Mitchell* v. *Castle* (1) and by Russell J. in *Civil Service Co-operative Society, Ltd.*, v. *Trustee of Sir J. R. D. M'Grigor, Bart.* (2), whether, as contended, they are to be merely regarded as obiter dicta or not.

(1) 94 L. T. R. 396.

(2) [1923] 2 Ch. 347.

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The question, therefore, of exercising our discretion or of conditions of relief under sect. 14 does not arise. But regretting, as I do, in the interests of commercial morality, that we are unable to give the liquidator of the plaintiff company, suing on behalf of the creditors, any relief, we must affirm the order of Wilson J. both as to action and counter-claim, and dismiss the appeal with costs.

Nov. 8.

ANDREWS L.J. :—

Three questions have been very fully debated before us. The first two affect the right of the company—or, shall I say, of the liquidator?—to obtain any relief from the forfeiture, which has admittedly occurred; whilst the third relates to the terms upon which such relief should, if at all, be granted.

The first answer which the defendant makes to the plaintiffs' claim is that the lease of 12th November, 1917, was a "lease of agricultural or pastoral land" within sect. 2, sub-s. 3 (*a*), of the Conveyancing Act, 1892, to which class of lease the provisions of sect. 14, sub-s. 2, of the Conveyancing Act, 1881, enabling the Court to grant relief against forfeiture, do not apply. It would be difficult to conceive more inartistic draftsmanship than the forfeiture clauses of these two Acts. Exception is grafted on exception in the most bewildering fashion—a system which necessarily leaves the rights of the parties somewhat vague and indeterminate. The relevant portions of the enactments may, however, be briefly summarised thus: sub-ss. 1 and 2 of sect. 14 of the Act of 1881 provide for relief against forfeiture. Sub-s. 6 (i) of sect. 14, however, excepts from the operation of this section breaches of conditions for forfeiture on the bankruptcy of the lessee; and by sect. 2, sub-s. 15, the term "bankruptcy" includes liquidation by arrangement. If, therefore, the Act of 1881 stood alone, the plaintiff company would obviously have no right to relief. How, then, is the position affected by sect. 2, sub-s. 2, of the Act of 1892? This sub-section extends the provisions for relief given by sect. 14 to the case of forfeiture on the bankruptcy of the lessee, but for the period of one year only from the date of the bankruptcy, unless the lessee's interest be sold within that time. If the lessee's interest be so sold, the provisions for relief are made generally applicable. Sect. 2, sub-s. 3, however, provides that sect. 2, sub-s. 2, is not to apply to certain specified leases, the first of which is a "lease of agricultural or pastoral land." If, therefore, the lease of 12th November, 1917, is a lease of this character, the provisions of sect. 2, sub-s. 2, of the Act of 1892 do not apply, and the plaintiff company are thrown back upon the Act of 1881, under which no relief can, in the circumstances, be obtained.

What is a "lease of agricultural or pastoral land" within the section? We get no aid in its interpretation from the nature of

the subject-matter of the other leases referred to in this clause of exceptions, as it is impossible to find any universal principle underlying all. We have been referred to various sections of the Irish Land Acts of 1870, 1876, 1881, and 1896, in which references to "holdings which are not agricultural or pastoral in their character" and other similar expressions occur. I agree with Mr. Murphy, however, that judicial dicta and decisions on such phrases in our Irish land code afford no guide to the interpretation of the words of the Conveyancing Act of 1892, if only because one refers to "holdings," whilst the other refers to "leases." Mr. Babington's contention is not so much that the expression, "a lease of agricultural or pastoral land," is confined to a lease of what is exclusively such, but rather that it is, as he puts it, "a question of degree in every case," or, as I understand his argument, that its true character is dependent on whether or not the agricultural or pastoral lands predominate. I cannot accept this view, for I find no words in the section to justify it. When once it is held, as in my opinion it must be held, that a lease may be a "lease of agricultural or pastoral land," though it be not a lease of such lands exclusively, I consider that the words of the section are satisfied if any substantial portion of the premises comprised in it are of that character. If so, no one can deny that the lease of 1917, comprising a farm of some thirty-seven and a half acres, which was worked, as one of the plaintiffs' witnesses admitted, in the ordinary rotation of crops, was such a lease as falls within the section referred to. I am of opinion, therefore, that on this ground alone the plaintiff company must fail in their action.

The second question is one of some nicety. Sub-s. 2 of sect. 2 of the Act of 1892 applies sect. 14, sub-s. 6, of the Act of 1881 to a condition for forfeiture on the bankruptcy of the lessee only after the expiration of one year from the date of the bankruptcy, and provided the lessee's interest be not sold within such one year. It is therefore necessary to determine whether the lessee's interest was "sold" within the year. The resolution for voluntary liquidation was passed on 11th April, 1922. On 12th February, 1923, a contract for sale of the premises was entered into between the plaintiff company in liquidation by Mr. Hugh Boyd, the liquidator, and a Mr. Samuel M'Cord, at the sum of £3,500. The ninth clause of the conditions of sale referred expressly to the forfeiture clause in the lease and to the lessor's notice, and the sale was made subject to the granting of relief to the vendors. In other words, the contract of sale was conditional, not absolute, in character. It has, of course, not been completed by conveyance, pending the result of these proceedings, and more than a year has now elapsed since the liquidation resolution was passed.

Does the contract referred to amount to a sale within the section? The Act of 1892 contains no definition of the term "sale," but such a definition is to be found in sect. 2, sub-s. 8, of

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the Act of 1881. This section contains a very wide definition of the word "purchaser," including a lessee or mortgagee and an intending purchaser, with a corresponding meaning for the term "purchase." The section concludes with the words: "But sale means only a sale properly so called." The contrast is clear. As the term "purchase" includes intended purchase, one would naturally expect that the term "sale" would include intended sale. The contrary is the case. The definition of "sale" is introduced by the arrestive conjunction "but," which clearly conveys that the word does not bear that meaning which would be expected to follow from the definition of "purchase," which immediately precedes. It is not sufficient, therefore, to satisfy the expression "sale" that premises should be intended to be sold, as are the premises in this case, if the Court grants the necessary relief against forfeiture. There must be a sale completed by conveyance, or at least an unconditional contract capable of being enforced by a decree for specific performance. Nothing less than this could, in my opinion, be described as "a sale properly so called."

I prefer to base my judgment upon this point on the words of this definition section rather than on authority which is somewhat inconclusive. Mr. Murphy laid great stress for the defendant upon the case of *Re Henry Castle & Sons, Mitchell* v. *Henry Castle & Sons* (1), where a conditional contract was held by Joyce J. not to amount to a sale within sect. 2, sub-s. 2, of the Act of 1892. But there the sale was entered into merely as an arrangement for the purpose of obtaining the benefit of the provisions in the Acts against forfeiture. The agreement clearly shows that it was not contemplated by either party that the named purchaser should be the ultimate purchaser. He was little, if anything, more than the Receiver's nominee, bound to transfer the premises on merely recoupment terms to the purchaser of the business if the Receiver should succeed in selling it within one year from the date of the agreement. That decision, though useful, does not govern this case.

Mr. Murphy also referred us to the recent decision of Russell J. in *Civil Service Co-operative Society, Limited*, v. *Trustee of Sir J. R. D. M'Grigor, Bart.* (2). At p. 355 of his judgment the learned Judge says: "In my opinion the operation of sect. 2, sub-s. 2, of the Act of 1892 is this: the right of entry or forfeiture on bankruptcy of the lessee, or on taking in execution of the lessee's interest, is fettered; if the lessee's interest be not sold within the one year, the fetter is removed at the end of the year; if the lessee's interest be sold within the one year, the fetter is not removed, but continues. In the present case the lessee's interest has not been sold; a conditional contract for sale has been entered into conditional upon the defendant succeeding in the present

(1) 94 L. T. R. 396.

(2) [1923] 2 Ch. 347.

action." Here is the clear and unambiguous statement of Russell J.'s view of the true construction of the section, namely, that the premises could not be said to be "sold" merely because a conditional contract for sale had been entered into within the specified period. Its weight is only detracted from by the fact that it must be regarded merely as a dictum of the learned Judge, as no argument appears to have been directed to the point, and nowhere else in the report is any mention made of the conditional contract to which he refers. Regarded, however, as a dictum, it is, in my opinion, an expression of sound law.

For these reasons this second question must also be decided against the plaintiffs; and in the circumstances I find it unnecessary, and accordingly decline to indulge in what would be merely academic speculation as to the terms upon which the plaintiffs should have received relief against the forfeiture had they succeeded in establishing a legal right to it.

The appeal must be dismissed with costs.

Solicitors for the plaintiffs: *J. A. Caruth & Owens.*
Solicitor for the defendant: *A. L. M'Clelland.*

J. M'C.

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June 15.
July 31.
August 1.

THE KING (O'BRIEN) *v.* THE MILITARY GOVERNOR OF THE MILITARY INTERNMENT CAMP, NORTH DUBLIN UNION, AND THE MINISTER OF DEFENCE.

Habeas corpus—State of war or armed rebellion—Liberty of subject—Martial law—Jurisdiction of the civil Courts to determine when state of war is at an end—Constitution of the Irish Free State, Articles 6 and 47—Public Safety (Emergency Powers) Act, 1923—Powers of Executive Minister thereunder—Bills for the immediate preservation of the public peace—Declaration by both Houses of the Oireachtas.

The civil Courts are bound, when their jurisdiction is invoked, to decide whether or not there exists a state of war or armed rebellion, but once they decide there is a state of war or armed rebellion they have no power to prohibit, control, or interfere with any act of the military forces. Article 6 of the Irish Free State Constitution is merely declaratory of the pre-existing law.

The Court of Appeal on the evidence *held* that a state of war or armed rebellion did not exist in Dublin at the time of the application, and accordingly ordered a writ of habeas corpus to issue to the respondents, in whose custody Mrs. Nora O'Brien was detained.

In answer to the writ the respondents certified and returned that the prisoner was detained in custody under an order of Richard Mulcahy, an Executive Minister of Saorstat Éireann, within the meaning of the Public Safety (Emergency Powers) Act, 1923, he being of opinion that the public safety would be endangered by the prisoner being set at liberty. The validity of the return was questioned on the ground that the Act enabling a Minister to make such an order had been passed only the previous day, and that the declaration by both Houses of the Oireachtas, that the Bill was necessary for the immediate preservation of the public peace or safety, required by Article 47 of the Constitution had not been made.

Held, that the Act could not be relied upon, and that the return was no answer to the writ.

HABEAS CORPUS.

Mrs. Nora Connolly O'Brien was taken into custody at 19 Ely Place, Dublin, by soldiers of the Free State on the 14th January, 1923, and was detained in the North Dublin Union, which was used by the military authorities as an internment camp, at the date of this application. Motion on her behalf was made ex parte, in the first instance, to the Master of the Rolls for a writ of habeas corpus directed to the Military Governor of the Military Internment Camp, North Dublin Union, and the Minister of Defence. The writ was refused, but liberty was given to serve notice on the Free State authorities, which was accordingly done, and the motion came on for argument on the 15th June. The motion was grounded on the affidavit of the applicant's sister, who deposed:—

1. My sister, Nóra ní Chonghaile Bean Shéamuis uí Bhriain, of 19 Ely Place, in the County of the City of Dublin, was taken into military custody at her husband's residence at the above address on or about the 14th day of January, 1923, and is at present detained in the North Dublin Union, which is used as a military internment camp by the Free State army.

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2. I am informed by my said sister and believe that no charge has been preferred against her.

3. I refrained from applying for a writ of habeas corpus ad subjiciendum at an earlier date, being advised that owing to the existence of a state of war within the area of jurisdiction of this Court such application would have been held unsustainable. I beg to refer to a copy of the *Irish Times* newspaper of the 29th day of May, 1923, containing a proclamation by Mr. Eamonn de Valera, President, and Mr. Frank Aiken, Chief of Staff of the I.R.A., from which it appears that the said I.R.A., against whom the said Free State army have been waging war, have been ordered to cease all acts of warfare.

4. The said North Dublin Union Military Internment Camp is under the command of a military governor or commandant, and I respectfully beg this honourable Court to issue writs of habeas corpus ad subjiciendum directed to the Aire Cosanta and to the military governor or commandant of the said internment camp respectively, commanding them to have the body of my sister, the said Nóra ní Chonghaile Bean Shéamuis uí Bhriain, before this honourable Court, with the reasons for her detention, on a date to be named in the said writs.

The following affidavit was filed by the Chief State Solicitor on behalf of the authorities:—

I, Gearóid Ó Súilleaváin, of General Headquarters, Parkgate Street, in the County of the City of Dublin, Lieutenant-General, aged 21 years and upwards, make oath and say as follows:—

1. I am the Adjutant-General of the army of Saorstat Éireann (commonly called Ógláigh na hÉireann), and I make the following affidavit from facts within my knowledge as such Adjutant-General, save where the contrary appears.

2. I beg to refer to the affidavit sworn by me and filed in this Division on the 20th November, 1922, in a matter of "The King (at the prosecution of Erskine Childers) against the Officer Commanding the Troops, Portobello Barracks, in the County of Dublin, and the Adjutant-General of the Provisional Government Forces, Gearóid O'Sullivan," and I say that the military position as it stood in this country at the time of the swearing of the said affidavit is correctly stated therein.

3. Since November last active operations have been carried on throughout the country by the army, and these operations have been to a considerable extent successful. Large areas have been rendered comparatively free from the tyranny exercised by the armed irregulars. The National troops have moved around rapidly by night and day, and thereby kept the irregular forces continually on the move. Many engagements have taken place between the National forces and the irregulars, in which the latter have been defeated, and in some places encircling movements have been carried out by the army whereby numbers of the irregulars have been rounded up and taken prisoners, and quantities of arms and ammunition captured. There are still numbers of these irregulars at large, and the army authorities are satisfied that there are considerable quantities of arms and ammunition throughout the country, either in the hands of the irregulars or concealed in dumps known only to the irregulars, and available for use by them as and when required.

4. Active and vigorous operations are still being carried on from day to day by the National army according to plan. By means of such operations, pressed without interruption, the army hope to be able to round up and to capture such of the active irregulars as are still at large, and to locate and take possession of the arms and ammunition in their possession.

5. I am aware, from the perusal of quantities of documents and correspondence captured by us from the irregulars, that part of the deliberate plan of campaign of the irregulars was to seize tracts of land throughout the country, and hold them by force against the rightful owners with a

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view to upsetting the forces of law and order and reducing the country to a state of anarchy. In pursuance of such plan large tracts of land were taken and held by force throughout the country, without any show or claim of legal right or justification. This campaign could only be met and dealt with by means of military force, and such force has been and is being used. Several of these tracts of land have been taken over by the military forces from persons who were unlawfully in possession thereof, and have been restored to their rightful owners. There are still many such places with which they have not as yet had time to deal. These places are held by force against their rightful owners, and the latter can only be restored thereto and protected in the possession thereof by military action.

6. Owing to the condition prevailing in the country it has not been possible to hold an Assize since July, 1921. Great progress has been made in restoring trial by jury at Quarter Sessions, but there are still areas in which circumstances have not so far returned to normal as to allow the free functioning of juries. In Dublin and elsewhere the Courts have been kept open and functioning only by being guarded night and day by the army. In various places it is impossible to have writs served in the ordinary way, and applications for the service of writs by post or otherwise are of frequent occurrence. In executing decrees of the Court the Sheriffs have been compelled to call for and have been accorded military assistance.

7. With reference to paragraph 3 of the affidavit of Moira Connolly filed hereof, I beg to refer to a copy as captured by the army of the document published in the said issue of the *Irish Times*, on which, marked with the letter "A," I have signed my name before the swearing hereof. The actual captured document did not bear the signature of Mr. de Valera and Mr. Aiken, or either of them. It is not known whether there was in fact an original or whether same was signed by Mr. de Valera or Mr. Aiken. In addition, there is to the knowledge of the army authorities considerable dissension existing amongst the irregular forces, and the army authorities consider that neither Mr. de Valera nor Mr. Aiken can speak for or control the said irregular forces.

8. On the 25th May, 1923, the army captured one P. J. M'Donnell, who is described as O.C. Fourth Western Division of the Irregulars, and on his arrest was found to be in possession of a document signed by S. Hyde, who is alleged to be and described as being "O.C. Western Command." I beg to refer to the original of the said document, on which, marked with the letter "B," I have signed my name before swearing hereof, and would direct particular attention to paragraphs 3 and 4 thereof and to the advice given at the end of paragraph 4, that the person to whom the order is addressed is to use the "breathing space" therein mentioned for the purpose of strengthening the position of the irregulars and prepare for any eventuality that may arise.

9. I also beg to refer to a copy of the *Irish Times* newspaper of the 28th April, 1923, containing what purports to be an order dated the 27th April by the said Frank Aiken and a proclamation of the said date by Mr. de Valera, on which said newspaper, marked with the letter "C," I have signed my name before swearing hereof.

10. Consequent on the said order and proclamation Mr. de Valera commenced certain negotiations through Mr. Andrew Jameson and Mr. James Douglas, both members of Seanad Éireann, and the result of these negotiations is stated in the official report of the proceedings in Parliament of the 9th day of May, 1923, commencing at column 676. I beg to refer to volume iii, No. 11, of the said Parliamentary Report, on which, marked with the letter "D," I have signed my name before swearing hereof. I would direct attention to columns 681 and 682 of the said report, containing copy of a letter from the President of the Executive Council, written on behalf of the Government, wherein he states the conditions essential for the restoration of a state of peace, one vital stipulation being that all lethal weapons within the country must be brought within the effective custody or control of the Executive Government responsible to the people through their representatives.

11. It is clear from the documents published in the *Irish Times* of the 29th May, 1923, that there is no intention on the part of the irregulars to accept this condition of peace. In this connexion I beg to refer to a copy of the *Irish Times* newspaper of the 11th June, 1923, on which, marked with the letter "E," I have endorsed my name before swearing hereof. The said newspaper contains what purports to be the report of a speech alleged to have been made on Sunday, the 10th inst., by Miss Mary M'Swiney at Kilkenny. Miss M'Swiney is a member of Mr. de Valera's "Council of State" so called, and is and has been an active supporter of Mr. de Valera and of the irregular campaign.

12. Notwithstanding the said order and proclamation of the 27th April, 1923, the irregular campaign proceeded with considerable violence, and I beg to refer to the following statistics for four weeks subsequent to the 27th April as indicating the extent of said campaign. During the said four weeks there were seventeen cases of attacks upon the troops, forty-five cases of attacks upon military posts, five cases of rail destruction, seven burnings, seven raids and attacks upon post offices and Civic Guard, seventeen cases of house robberies under arms, and sixteen cases of road robberies under arms. Six members of the army were wounded during the said period as a result of said campaign.

13. For the fortnight ending 8th June, 1923, and following the alleged proclamation referred to in the affidavit of the said Moira Connolly, there were eleven attacks on troops, nine attacks on military posts, two burnings, eleven house robberies under arms, and eight road robberies under arms; and during this period three members of the army were wounded. The foregoing figures in both cases include only such outrages as are believed to have been due to the activities of the irregulars.

14. There are at the present time about 10,300 prisoners in military custody, and the military authorities are satisfied that if these prisoners were released at the present stage destruction would be carried on with renewed vigour against the State. At no time have the irregulars or anyone speaking on their behalf expressed any regret in respect of the destruction of life and property resulting from their activities during the past year.

15. On the morning of the 28th January, 1923, a party of National troops proceeded to No. 19 Ely Place, Dublin, and knocked repeatedly, but got no answer. Eventually they had to force their way into the house, the sole occupants of which were Mrs. Nora Connolly O'Brien, the applicant herein, and her husband, Mr. Séamus O'Brien, who lived in a flat in said house. In a room in this flat the soldiers discovered various documents, showing that Mrs. O'Brien and her husband were intimately connected with the irregulars and actively associated with their campaign.

16. In the circumstances hereinbefore set forth the army authorities consider that the state of war or armed rebellion which has existed in this country for the past year has not yet come to an end, and they have reason to believe that the irregulars are at the present time actively engaged in reorganising themselves, and are using this period as a "breathing space" for the purpose. From documents and information in the possession of the army authorities it is apparent that the irregulars intend to recommence extensive operations as and when they consider the moment opportune; and I say on behalf of the army authorities that is still a matter of military necessity and essential for the complete suppression of the said armed rebellion, the maintenance of the degree of peace and order which has been restored, and the completion of the work of establishing peace and order on a firm basis, that persons engaged in the aforesaid irregular hostilities and their active supporters and adherents should be detained in military custody until the said rebellion has been completely suppressed and peace and order restored. The military authorities are continually reviewing the cases of persons detained, and are making releases according as they find it consistent with the public safety for which they are responsible.

Lynn for the prosecutor.

The Attorney-General of the Free State, *Hugh Kennedy K.C.* (with him *T. Sullivan K.C.* and *J. O'Byrne*), for the respondents.

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O'CONNOR M.R. :—

The application for a writ of habeas corpus in this case was in the first instance made ex parte, and was supported by an affidavit of Moira Connolly. That affidavit contained the following statement: "I refrained from applying for a writ of habeas corpus at an earlier date, being advised that owing to the existence of a state of war within the area of jurisdiction of this Court such application would have been unsustainable. I beg to refer to a copy of the *Irish Times* newspaper of 29th May, 1923, containing a proclamation by Mr. Eamonn de Valera, president, and Mr. Frank Aiken, chief of the staff of the I.R.A., from which it appears that the said I.R.A., against whom the said Free State army have been waging war, have been ordered to cease all acts of warfare." I interpreted this as meaning that a state of war admittedly existed up to May 29th, 1923; and that being so, I was of opinion that it lay upon the applicant to show that the state of war had ceased. The only evidence offered of the cessation of hostilities was the reference to the *Irish Times*, but if I were able to regard that as evidence it fell far short of the proof that the state of war was changed into a state of peace. A "cease fire order" does not always mean the end of a battle. Even a retirement may only mean a manœuvre to take up a better position for the resumption of hostilities. As the matter stood on the affidavit I referred to, I felt I would have been obliged to refuse the application for a writ; but as I was anxious in this case, in which the liberty of the subject was involved, to give the applicant every chance, I gave her liberty to serve notice of motion on the Free State authority. I thought it possible that the affidavit already made might be supported by further evidence that the state of war which it was admitted had existed had been determined. Notice of motion was served, and the Free State authority has appeared. No further evidence has been offered on behalf of the applicant, and for that reason alone I would have been obliged to refuse the issue of a writ. But an affidavit has been filed on behalf of the Free State which clearly shows that hostilities have not ceased. Documents and reports of speeches emanating from the Irish Republican Party have been referred to, from which it clearly appears that the "cease fire" order did not mean surrender, but rather a rest for the moment in order to be in a better position to renew hostilities. Indeed, it was publicly stated that the men who had been fighting were getting ready to fight again. This shows the true meaning of the proclamation on which the applicant relies. The affidavit filed on behalf of the Free State shows that, so far from the proclamation resulting in bringing about a cessation of hostilities, attacks on the Government troops continue. It is common knowledge—and what is common knowledge I can take judicial notice of—that the Free State army has not been allowed to rest. What do I see on my way down to Court every morning?

Armoured cars, military lorries full of armed troops, military patrols in our chief thoroughfares; even the approaches to the Courts guarded by soldiers with fixed bayonets. When I see all this, surely I cannot say that we have arrived at a state of peace, for which all orderly citizens are longing. It is my earnest hope that a real state of peace will soon be established, and that no citizen of the Free State will be deprived of his liberty without being tried and condemned by the ordinary and duly constituted Courts of the country. I must refuse the motion.

R. R.

July 31.
August 1.

The prosecutor appealed to the Court of Appeal (1), and further affidavits were filed on behalf of the parties by leave of the Court. The further steps in the proceedings and a sufficient summary for the purpose of this report of the additional affidavits filed are set out in the judgments of Molony C.J. (infra).

An application for a writ of habeas corpus having been made and refused by Powell J. in the case of a Mr. Eamonn Donnelly, in which the facts and evidence were substantially the same as in Mrs. O'Brien's case, the Court decided to hear the arguments in both appeals before giving judgment. The nature of the arguments appears from the judgments.

The Attorney-General of the Free State, *Hugh Kennedy K.C.*, and *Timothy Sullivan* (with them *John O'Byrne*), for the State.

Lynn, for Mrs. Nora Connolly O'Brien.

Comyn K.C. (with him *Lynn*), for Eamonn Donnelly.

July 31.

MOLONY C.J.:—

MRS. NORA CONNOLLY O'BRIEN'S CASE.

Mrs. Nora Connolly O'Brien was taken into custody at 19 Ely Place by soldiers of the Free State on the 14th January, 1923, and is at present detained in the North Dublin Union, which is used as an internment camp. She applied to the Master of the Rolls for a writ of habeas corpus, and on the 15th June, 1923, the motion was heard and refused. She served a notice of appeal from the order on the 6th July, and when the appeal came to be heard on the 17th of July an application was made for permission to put in further affidavits, and liberty was given to both sides to do so, the hearing of the appeal being adjourned. Further affidavits have now been filed, and we are in a position to dispose of the case with additional information about the state of the country since the application was made to the Master of the Rolls.

The position of Mrs. O'Brien is perfectly clear. She relies on Article 6 of the Constitution, which declares that the liberty of the person is inviolable, and that no person shall be deprived

(1) Before MOLONY C.J. and RONAN L.J.

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of his liberty except in accordance with law, and claims that under the provisions of this article she is entitled to an order in the nature of a habeas corpus. She has not been charged with any offence, and she claims that she is being detained not in accordance with law. The Attorney-General admits that no charge has been made against her, and that she is being detained by the military forces of the State, and relies upon the proviso to Article 6 as justification for the acts of the military authorities. The proviso is as follows: "Provided, however, that nothing in this Article contained shall be invoked to prohibit, control, or interfere with any act of the military forces of the Irish Free State (Saorstat Éireann) during the existence of a state of war or armed rebellion." In the circumstances it is clear that Mrs. O'Brien is entitled to a writ of habeas corpus unless a state of war or armed rebellion at present exists in Dublin, and the onus of establishing this clearly rests with the person who seeks to justify the detention.

The article of the Constitution is only declaratory of the pre-existing law, and accords with the decisions of the King's Bench Division in *The King* v. *Allen* (1), *The King* (*Garde and Others*) v. *Strickland* (2), *The King* (*Ronayne and Mulcahy*) v. *Strickland* (3), *The King* (*Johnstone*) v. *O'Sullivan* (4), affirmed by this Court (5). To the same effect is the decision of the Master of the Rolls in *The King* (*Childers*) v. *The Adjutant-General of the Forces of the Irish Provisional Government* (6). The Court is bound, when its jurisdiction is invoked, to decide whether or not there exists a state of war or armed rebellion; but once it so decides, it has no power to prohibit, control, or interfere with any act of the military forces, whether it is a matter of detention, as in the present case, or the execution of a capital sentence after trial by a so-called military Court, as in *Allen's Case* (1) and *Childers' Case* (6), or the execution of a person without trial, as in Rory O'Connor's case.

Arguments have been addressed to us on the assumption that all the Government or the military authorities desire to do is to detain Mrs. O'Brien and other persons now in custody for such time as may be thought expedient in the public interest; but if there is war, we cannot, durante bello, inquire into or pass judgment upon the conduct of the Commander of the Forces in repressing the war: *The King* (*Ronayne and Mulcahy*) v. *Strickland* (3); and if there is not war, it is our manifest duty to see that no person shall be deprived of his or her liberty except in accordance with the law. The issue, then, in all these cases is whether there is or is not that deliberate, organised resistance by force and arms to the laws and operations of the lawful Government, amounting to war or armed rebellion, which justifies what is sometimes called martial law, but which is in fact no law

(1) [1921] 2 I. R. 241.
(2) [1921] 2 I R. 317-334.
(3) [1921] 2 I. R. 333.
(4) [1923] 2 I R. 18.
(5) [1923] 2 I R. 17.
(6) [1923] 1 I. R. 5.

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at all, but summary justice administered under the supervision of a military commander: *Tilonko* v. *The Attorney-General of Natal* (1). As Lord Halsbury said in *Ex parte Marais* (2): "The truth is that no doubt has ever existed that where war actually prevails the ordinary Courts have no jurisdiction over the action of the military authorities. Doubtless cases of difficulty arise when the fact of a state of rebellion or insurrection is not clearly established. It may often be a question whether a mere riot or disturbance, neither so serious nor so extensive as really to amount to a war at all, has not been treated with an excessive severity, and whether the intervention of the military force was necessary; but once let the fact of actual war be established and there is an universal consensus of opinion that the civil Courts have no jurisdiction to call in question the propriety of the action of the military authorities."

I now proceed to consider the evidence which is relied upon by the Attorney-General as proof that a state of war or armed rebellion exists. In the first affidavit of General O'Sullivan, the Adjutant-General, sworn the 14th June, 1923, an exhibit is made of the issue of the *Irish Times* newspaper dated April 28th, 1923, containing a proclamation, purporting to be signed by Mr. de Valera, advancing certain proposals of peace, and stating, as evidence of good will, that the army command is issuing therewith an order to all units to suspend aggressive action, to take effect as soon as may be, but not later than noon, Monday, April 30th. The accompanying document purports to be signed Frank Aiken, Chief of Staff, and is headed "Suspension of Offensive," and directs that arrangements be made for the suspension of all aggressive operations in accordance with the proclamation.

The Adjutant-General in his affidavit refers to a former affidavit sworn by him in the *Childers' Case* (3) on November 20, 1922, as correctly stating the military position as it stood at that time. This affidavit will be found in full in [1923] 1 I.R., at p. 9, and establishes beyond doubt that at that time a state of war existed. He next states that since last November active operations have been carried on throughout the country by the army, and that these operations have been to a considerable extent a success, large areas having been rendered comparatively free from the tyranny exercised by armed irregulars, but that there are still numbers of these irregulars at large, and that the army authorities are satisfied that there are considerable quantities of arms and ammunition throughout the country, either in the hands of irregulars or concealed in dumps known only to the irregulars, and available for use by them as and when required. He refers to the acts of irregulars in seizing tracts of land throughout the country and holding them by force against the rightful owners, and to the difficulties which have prevailed in

(1) [1907] A. C. 93–95. (2) [1902] A. C. 109–115.

(3) [1923] 1 I. R. 9.

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reference to the civil administration of the country. He next proceeds to show that the campaign of the irregulars proceeded with considerable violence notwithstanding the proclamation of the 27th April, 1923, and he refers to the following statistics for four weeks subsequent to the 27th April as indicating the extent of the said campaign. During the said four weeks there were seventeen cases of attacks upon troops, forty-five cases of attacks upon military posts, five cases of rail obstruction, seven burnings, seven raids and attacks on post offices and Civic Guards, seventeen cases of house robberies under arms, and sixteen cases of road robberies under arms. Six members of the army were wounded during this period as a result of the campaign.

Four weeks from the 27th April brings us down to the 24th May, and it appears that upon that day a further order or proclamation was issued by Mr. de Valera, stating that the republic could no longer be defended successfully, and that further sacrifices on the part of the soldiers would be vain, and continuance of the struggle in arms unwise in the national interest. This order contains a further statement, which is relied upon as showing that the struggle might be renewed at any time. He says that seven years of intense effort have exhausted our people. Their sacrifices and their sorrows have been many. If they had turned away and had not given the active support which alone could bring victory in this last war, it is because they are weary and need a rest. Give them a little time, and you will yet see them recover and rally again to the standard. This was accompanied by an order from Mr. Frank Aiken to his comrades that the arms with which they had fought were to be dumped. For a fortnight after this proclamation there were quite a number of offences, but in a decreasing ratio from the previous four weeks. There were eleven attacks on troops, nine attacks on military posts, two burnings, eleven house robberies under arms, and eight road robberies under arms, and during this period three members of the army were wounded.

In the second affidavit of General O'Sullivan, sworn the 21st day of July, the statistics for five weeks commencing 9th June and ending 13th July are given, and it appears that during that period there were six attacks upon troops, three cases of attacks upon military posts, four cases of wire destruction, one case of the erection of barricades, four cases of burnings, ten cases of house robberies, five cases of road robberies, two cases of shootings, and three cases of escapes from military custody; and he states that those offences include only such outrages as were due to the activities of the irregulars. It does not appear that any soldiers were wounded during the five weeks under review. On these statistics it must be admitted that there has been a great diminution in the number of offences. We have not been afforded any information as to the places in the Free State where and the circumstances under which these alleged outrages took place; and we are asked by counsel for Mrs. O'Brien to assume that they

cannot have been serious in their character, on the strength of an affidavit by Mr. Roderick Connolly, a journalist, who swears that since the 15th June he has carefully examined the daily papers issued in Dublin, and has found no reports of hostilities between the two forces. It could not be contended with any hope of success that the fact of these comparatively few outrages having taken place is in itself sufficient or satisfactory evidence of a state of war or armed rebellion. The Attorney-General, however, contends that active hostility is only kept in check by military force, and that the present state of affairs can best be described as a lull or interlude. It is, no doubt, true that a state of war or armed rebellion may exist notwithstanding an apparent cessation of hostilities, but it still lies on the Attorney-General to satisfy the Court that the cessation is not real or intended so to be, but only a "breathing space" to lead to renewed and perhaps greater efforts in the immediate future. In this connexion the Attorney-General relies on certain documents and statements exhibited in General O'Sullivan's affidavit. He refers in particular to a document dated 3rd May, 1923, purporting to be signed by S. Hyde, O.C. Western Command, and addressed to the adjutant of the division, in which Hyde refers to the peace proposals, and states that if they are rejected they will take up the fight with a united front and forge ahead with their objective, and that he hopes that during the breathing space no stone is being left unturned to strengthen their position and prepare for any eventuality that might arise. Reference is also made to a speech by Miss Mary M'Swiney, in which she says that the cease fire order had been given, but that there was no surrender, and that the men who had been fighting were getting ready to fight again; and also to a statement said to have been made in Glasgow by a man called Joseph Robinson, described as "O.C. Scotland," that the republican army is not beaten, and intended going on an offensive in the winter.

Against these statements, however, is to be put the statement by Mr. de Valera, appearing in the *Irish Times* on July 23rd, 1923, which paper has been exhibited in a supplemental affidavit. In that statement he is reported to have said: "It is not the intention of the republican government or the army executive to renew the war in the autumn or after the elections." I do not think Mr. de Valera's statement is outweighed by the statements of the comparatively obscure persons on which the Attorney-General relies. As regards the general state of the country at the present time, Mrs. O'Brien relies upon the statement made by the Postmaster-General in the Dáil on the 21st June, in which he refers to the 780 post offices which were either temporarily or wholly out of action "when hostilities terminated a month or six weeks ago," and to the statement of the Governor-General, made no doubt in his private capacity, that Ireland to-day is as tranquil as Great Britain.

I think I have now given a fair summary of the affidavits on

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both sides, and of the various exhibits. We regard with great doubt the admissibility of some of the exhibits and statements referred to; but as this is a case affecting the liberty of the subject, we thought it better to give every latitude to both sides regarding the evidence, whether by affidavit or exhibit, that they desired to place before the Court. In the result I am satisfied that it has not been proved that a state of war or armed rebellion at present exists in the City of Dublin. There is, no doubt, a certain amount of disorder, and the presence of the military may be sometimes required for the purpose of assisting the police in the maintenance of order or the protection of buildings. Parliament is, however, sitting without interruption; every Court is functioning, writs are duly served and executed, and while it may be sometimes necessary that the civil administration should be aided by military force, it by no means follows that in every case where military aid is necessary a state of war or rebellion can be said to exist. For instance, General O'Sullivan states that in executing decrees of the Courts sheriffs have been compelled to call for and have been accorded military assistance. There have been many occasions in the history of our land on which it has been found necessary to call on the police and military to protect the civil authorities in the discharge of their duties; but it is part of the common law of this country that the sheriff or anybody charged with the execution of a writ of a competent Court has a right to require the assistance of the police, and even of the military, and that the Executive has no power to prevent such assistance being given. I need hardly refer to the well-known case of *Miller* v. *Knox* (1); the judgment of Palles C.B. in the case of the Woodford prisoners at the Connaught Assizes, 1886 (2); and *Attorney-General* v. *Kissane* (3).

The Attorney-General has referred to the great work which the army has done in so far securing the peace and order of the country, and has asked us not to destroy the fruits of their labour by a premature release of prisoners, whose power for evil is said to be still great. I am fully conscious of the great success of the army and of the debt which every law-abiding citizen owes to them for their courage and sacrifices in the midst of great and almost unexampled difficulties. It is the success of their efforts which has made this application possible, and just as it was their duty to defeat the rebellion, which they have done, so it is our duty, when the rebellion has been defeated, to restore to the applicant her "inviolable right of personal liberty," which we now do by ordering, pursuant to Article 6 of the Constitution, a writ of habeas corpus to issue directed to General Richard Mulcahy, Commander-in-Chief of the Forces, and we make the writ returnable here on to-morrow morning at 11 o'clock.

(1) 4 Bingham, New Cases, 574 (2) Judgments of the Superior Courts in Ireland, published under the direction of the Attorney-General, 1889, page 23.
(3) 32 L. R. Ir. 220

EAMONN DONNELLY'S CASE.

As regards the case of Eamonn Donnelly, the facts and evidence are substantially the same as in Mrs. O'Brien's case; but we gave leave yesterday to the Attorney-General to put in evidence a letter from "F. A."—stated to be Frank Aiken, chief of staff of the irregular forces—addressed to "E. O'M.," and found in the possession of Ernest O'Malley, who is at present in custody. It has been contended that this document shows that the present cessation of hostilities is only what was called by the Attorney-General a "momentary lull," and that arrangements are being made for the purpose of renewing the hostilities in the near future. I do not think this letter assists the Attorney-General in his argument, although it certainly displays an unrepentant and even truculent spirit. The writer admits that they have failed, and discusses reasons for that failure. And then comes the phrase which has been mainly relied upon by the Attorney-General: "With regard to the future, I believe the rifle and revolver is out of date as an offensive weapon, and that riflemen should only be on protection for special corps of engineers. The use of explosives, gas, and fire may be concentrated on, also small trench mortars." If this stood alone, it might be inferred that it was intended to resume the war at once, but that the method of warfare would not be by means of arms or ammunition, but by means of the greater use of explosives, gas, and fire than we have had experience of in the past.

The next two paragraphs, however, give two further causes for their failure—the defective military organisation, and the lack of civilian organisation; and he proceeds to state: "If we have to fight another war with the Staters, it will have to be short and sweet, and our units will need to be trained in taking the offensive in large bodies." The letter shows, I think, that the writer is fully aware of the defects which have led to the admitted failure of the war, which he regards as over, and that there is no immediate intention to renew the conflict, however much his letter may show a desire to do so. There is no student of history who is not aware that after every war the losers always wish or profess to wish for an opportunity to resume the conflict, and hope that the day may come when they will be in a position to do so. I consequently think that the letter exhibited does not add anything material to the Attorney-General's case, and the same result must follow as in Mrs. O'Brien's case.

RONAN L.J.: I agree.

The Attorney-General: I desire to make a formal return. The Court, except for the hearing of an interlocutory application, is incomplete. The appeal is from an ex parte application heard on notice, and the Court for final appeal is not complete.

MOLONY C.J.: It is. We are quite complete.

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Ronan L.J.: The Court can direct that an order be drawn up for the prisoners' discharge instead of waiting for a return to the writ. In my opinion we should make the order for discharge now.

The Attorney-General: I claim to make a return to the writ.

Ronan L.J.: The Court may in their discretion make an order——

The Attorney-General: Addressed to a jailer or constable?

Ronan L.J.: No; to anybody.

The Attorney-General: These persons are in the custody of the military forces.

Molony C.J.: We have full power to make an immediate order, but in the circumstances of the case we will make the order I have announced.

The following writ was issued in the case of Mrs. O'Brien, and a similar writ in the case of Mr. Donnelly:—

Saorstat Éireann, Court of Appeal. The King (Nora Connolly O'Brien, otherwise Nóra ní Chonghaile Bean Shéamuis uí Bhriain) *v.* The Military Governor of the Military Internment Camp at the North Dublin Union and the Minister of Defence.

George V, by the Grace of God of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith.

To the Military Governor of the Military Internment Camp, North Dublin Union, and the Minister of Defence.

We command you and each of you that you have at the Court of Appeal, Law Courts, Dublin Castle, on Thursday, the 2nd day of August, 1923, at the hour of 11 o'clock in the forenoon of said day, the body of Nóra ní Chonghaile Bean Shéamuis uí Bhriain, otherwise Nora Connolly O'Brien, being taken and detained under your custody as is said, together with the day and cause of her being taken and detained, by whatsoever name she may be called therein, to undergo and receive all and singular such matters and things as the said Court shall then and there consider of concerning her in this behalf, and have you there then this Our Writ.

Witness, The Right Hon. Thomas Francis Molony, Lord Chief Justice of Ireland, at the Law Courts, Dublin Castle, this first day of August, one thousand nine hundred and twenty-three.

Henry Maguire,
C. J. R. W.

By order of the Court of Appeal, dated 1st August, 1923.

August 2.

The case of Mrs. Nora Connolly O'Brien having been called, the Attorney-General, by direction of the Court, handed the return to the writ to the Registrar of the Court, who read as follows:—

The Return to this Writ appears by the Schedule hereunto annexed. The Answer of Commandant Timothy O'Neill, The Military Governor of the Military Internment Camp at the North Dublin Union, and Risteard Ua Maolchatha.

Schedule above referred to.

We, Commandant Timothy O'Neill, The Military Governor of the Military Internment Camp at the North Dublin Union, and Risteard Ua

Maolchatha, The Minister of Defence, in obedience to the Within Writ, do certify and return as follows:—

(1) We have in Court the body of the within-named Nora Connolly O'Brien, otherwise Nóra ní Chonghaile Bean Shéamuis uí Bhriain.

(2) The said Nora Connolly O'Brien, otherwise Nóra ní Chonghaile Bean Shéamuis uí Bhriain, was taken into custody on the 28th day of January, 1923.

(3) On the said 28th day of January, 1923, an armed rebellion against the Government of Saorstat Éireann was raging throughout all parts of Saorstat Éireann, and it was a matter of military necessity to arrest and detain the said Nora Connolly O'Brien, otherwise Nóra ní Chonghaile Bean Shéamuis uí Bhriain.

(4) The said state of armed rebellion has since continued and still exists in all parts of Saorstat Éireann.

(5) The said Nora Connolly O'Brien, otherwise Nóra ní Chonghaile Bean Shéamuis uí Bhriain, was at the date of the passing of the Public Safety (Emergency Powers) Act, 1923, detained in military custody. The said Nora Connolly O'Brien, otherwise Nóra ní Chonghaile Bean Shéamuis uí Bhriain, had not before the passing of the said Act been sentenced to a term of imprisonment or penal servitude by any tribunal established by the military authorities. On the 2nd day of August, 1923, Risteard Ua Maolchatha, an Executive Minister of Saorstat Éireann within the meaning of the said Act, being of opinion that the public safety would be endangered by the said Nora Connolly O'Brien, otherwise Nóra ní Chonghaile Bean Shéamuis uí Bhriain, being set at liberty, made an order whereby he ordered and directed that the said Nora Connolly O'Brien, otherwise Nóra ní Chonghaile Bean Shéamuis uí Bhriain, should be detained in custody under the said Act until further order, but not after the expiration of the said Act.

Dated this 2nd day of August, 1923.

TIMOTHY O'NEILL (Commandant), The Military Governor of the Military Internment Camp at the North Dublin Union.

RISTEARD UA MAOLCHATHA, The Minister of Defence.

A similar return was made in the case of Eamonn Donnelly.

Lynn asked that the return be quashed, as being in contravention of Article 47* of the Free State Constitution. Until the seven days mentioned in Article 47 have elapsed after the Bill

* Any Bill passed or deemed to have been passed by both Houses may be suspended for a period of ninety days on the written demand of two-fifths of the members of Dáil Éireann or of a majority of the members of Seanad Éireann presented to the President of the Executive Council not later than seven days from the day on which such Bill shall have been so passed or deemed to have been so passed. Such a Bill shall, in accordance with regulations to be made by the Oireachtas, be submitted by referendum to the decision of the people if demanded before the expiration of the ninety days, either by a resolution of Seanad Éireann, assented to by three-fifths of the members of Seanad Éireann, or by a petition signed by not less than one-twentieth of the voters then on the register of voters, and the decision of the people by a majority of the votes recorded on such referendum shall be conclusive. These provisions shall not apply to Money Bills or to such Bills as shall be declared by both Houses to be necessary for the immediate preservation of the public peace, health, or safety.

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has passed both Houses of the Oireachtas the Act does not come into force. The Bill only passed both Houses last night.

The Attorney-General submitted that Article 47, which was very carefully drawn, provided that a Bill might be suspended. It was only when an Act was in the Bill stage that it might be suspended, but in this case what the Court had before them was an Act. It had received the assent of the Governor-General, and the Court was bound to assume that it had been properly converted from the Bill stage to the Act stage. Consequently the Court was bound by it, and was not concerned with considerations as to whether the Act was only passed the previous day or not. If an Act were produced with the King's assent in England, no Court would entertain such considerations for a moment.

Ronan L.J.: The question is, what is the true construction of Article 47 of the Constitution? You have no declaration here by both Houses that this Bill was necessary for the immediate preservation of the public peace.

The Attorney-General: It is not for your Lordships to impeach the assent which has been given by the Governor-General.

Molony C.J.: Two things are admitted in this case. The first is that this particular measure only passed both Houses yesterday. The second is that no declaration was made.

The Attorney-General: I do not admit there was no declaration.

Molony C.J.: You will have to prove your declaration.

The Attorney-General: The question has not been formally raised. There is no evidence that both Houses did not make the declaration, but there is evidence that everything was rightly done, because you have the assent indicated in the Act. It is not open to the Court of its own initiative to question the assent. If it is to be attacked, let it be attacked by formally impugning the return to the writ.

August 1.

Molony C.J.:—

On yesterday we gave judgment to the effect that it was not proved to our satisfaction that there was a state of war or armed insurrection existing in the City of Dublin, and we directed a writ of habeas corpus to issue directed to the Military Governor of the Military Internment Camp, North Dublin Union, and the Minister of Defence, commanding them at 11 o'clock this morning to produce the body of Nora O'Brien, and to show by what right they claim to detain her in custody. The Governor of the internment camp and the Minister of Defence have accordingly produced here this morning the body of this lady, and have handed into the officer of the Court the return of the causes of her detention.

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They first say we have in Court the body of the within-named Nora Connolly O'Brien. Secondly, that she was taken into custody on the 28th January, 1923; thirdly, that on the said date an armed rebellion against the Government of Saorstat Éireann was raging throughout all parts of Saorstat Éireann, and it was a matter of military necessity to arrest and detain the said Nora Connolly O'Brien. Fourthly, that the said armed rebellion has since continued and still exists in all parts of Saorstat Éireann. Fifth, that the said Nora Connolly O'Brien has been and is now detained by virtue of the said military necessity; and then there is the sixth return, upon which the argument to-day has centred, namely, that the said Nora Connolly O'Brien, otherwise Nora O'Brien, was at the date of the passing of the Public Safety (Emergency Powers) Act, 1923, detained in military custody; the said Nora Connolly O'Brien had not before the passing of the said Act been sentenced to a term of imprisonment or penal servitude by any tribunal established by the military authorities; and on the 2nd August, 1923, Richard Mulcahy, an Executive Minister of Saorstat Éireann, within the meaning of the said Act, being of opinion that the public safety would be endangered by the said Nora Connolly O'Brien being set at liberty, made an order whereby he ordered and directed that she should be detained in custody under the said Act until further order, but not after the expiration of the said Act.

Upon that return being read by the officer of the Court under the rules, Mr. Lynn moves to quash the return and discharge the prisoner, and we take it that the Attorney-General at the same time moves that the prisoner be remanded in custody. As regards the first five paragraphs of the return, they are covered by our judgment of yesterday, and accordingly, being covered by our judgment, they are bad, because we then formally and judicially determined that although there was a state of war or armed rebellion existing up to a certain date, that that state of war or armed rebellion no longer exists, and the right of personal liberty was consequently restored to the subject.

The sixth paragraph, however, raises an entirely new question, which could not have been made yesterday, because at that time the Bill which is now claimed to have been converted into an Act had not passed both Houses. Mr. Lynn relies on Article 47 of the Constitution, and contends that although the Bill did pass both Houses yesterday, it has not become operative or binding, because the provisions of Article 47 have not been observed.

The Attorney-General, on the other hand, contends that once the Bill has received the Governor-General's assent we are bound to assume that Article 47 has no application; and Mr. Sullivan carried the argument a good deal farther, because he says that even if a demand had been made by the requisite number of members of the Dáil and of the Senate under Article 47 the President of the Executive Council still has a discretion to disregard such demand and submit the Bill at once to the Governor-

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General; and that the concluding words are only inserted ex abundante cautela, and have no operation in the circumstances of the present case.

Alternatively he submits that the third recital in the Act is a compliance with the last part of Article 47, and that consequently the provisions of Article 47 were in fact all complied with, and that the Act therefore became operative on the signature by the Governor-General, which appears to have been given upon yesterday according to the certificate which we accept of the Clerk of the Dáil. Now, in these circumstances it becomes necessary for us to consider the power and effect of Article 47. If the sixth clause of the return had been withdrawn, we would, of course, not have to consider this clause at all; but the Attorney-General says, and no doubt truly, that an order having been made by a member of the Executive Council, it does not lie with him to withdraw it, and that a judicial pronouncement must therefore be made upon it; and of course we are bound to pronounce judicially upon the matter, and we now proceed to do so.

Article 47 is as follows. [His Lordship read it.] What does that Article mean? A Bill has passed both Houses, but still the rights of the members of both Houses of the Legislature do not cease to exist. It may be that a number of members of the Legislature think, notwithstanding that a Bill has in fact passed a majority of both Houses, that the people should have the ultimate decision upon the question. How are they to express their views? The only way by which their views can be expressed under the Article is by a written demand. A written demand requires time. What time is to be given for that written demand? The Article says seven days. Consequently the scheme of the Article so far is this: A Bill passes both Houses, but notwithstanding that it passes both Houses two-fifths of the members of the Dáil or the majority of the Seanad may think that there should be a referendum and may express their thoughts in a constitutional manner under Article 47 by presenting a petition to the President of the Executive Council.

That would be rendered nugatory, of course, if immediately the Bill was passed, and the demand was made, it was open to the President of the Executive Council to disregard the demand and send it at once to the Governor-General, as has been contended for by Mr. Sullivan. But that is not the meaning of the Article at all. The word "may" there casts a duty upon the President of the Executive Council, if he refuses such a written demand, to submit it to referendum; and that is made perfectly clear by the words of the second clause, which says that such a Bill was in accordance with the regulations to be made by the Oireachtas to be submitted by referendum to the decision of the people when it is taken in a proper manner. Now, it was seen by the framers of this Constitution that circumstances might arise in which that clog upon rapid legislation might work injustice

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and perhaps do very grave or serious harm in the country; consequently it was thought that in certain circumstances these provisions should not apply, and accordingly the concluding words of the section are: "These provisions shall not apply to Money Bills or to such Bills as shall be declared by both Houses to be necessary for the immediate preservation of the public peace, health, or safety." Of course, if a declaration was presented to us, we would have nothing further to do. There is no evidence that such a declaration was ever made, except the third recital in the Act is to be considered such a declaration. We are not bound or even entitled, in a case where the liberty of the subject is concerned, to assume that such a declaration was made.

We now come to the contention of Mr. Sullivan, that the third recital in the Act amounts to a declaration within the concluding words of Article 47, and the third recital is as follows: "Whereas it is desirable that the civil authorities should be endowed with such powers as will enable them lawfully to co-operate with the military forces in the work of restoring and maintaining order and of re-establishing the supremacy of the law and civil government with or without military co-operation as may be possible as soon as the success of the military operations and circumstances of each district will permit." Now, that says that it is desirable that the civil authorities should be endowed with certain powers for the purpose of enabling them to co-operate with the military forces in the work of restoring and maintaining law and order. Does that comply with a provision of this clause of Article 47, which is that "these provisions shall not apply to Money Bills or to such Bills as shall be declared by both Houses to be necessary for the immediate preservation of the public peace, health, or safety."

One has only to put side by side the recital and the concluding words of Article 47 to see that that recital does not comply with the provisions which, according to the Constitution, the declaration should contain if it is to be held that immediate operation is to be given to the measure. In these circumstances I am satisfied that the sixth clause of this return must follow the same fate as the other five. This is a grave question—an important question. Once it is raised it must be decided. We decide it according to the best of our ability, and in this case in favour of the liberty of the subject. The result is that the entire return must be quashed, and we must order the release of this prisoner.

RONAN L.J.*:—

I am of the same opinion. I wish to say a few words mainly in reference to the construction of Article 47. I myself was of opinion yesterday that Mr. Lynn and Mr. Comyn had established that this girl was then in unlawful custody. I thought we should

* This judgment has not been revised by Ronan L.J.

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not detain her in unlawful custody for one unnecessary moment, but that, following the ordinary practice of the Court, we should make an order for the immediate issue of the writ, and, not waiting for the return to the writ, order her immediate discharge. It was treated as a matter almost of form when my Lord Chief Justice at the request of the Attorney-General said: "Let the writ issue and we will decide the question of discharge in the morning." The result has been that our entire decision is now sought to be practically reversed by matters which occurred afterwards, and that against the liberty of the subject. Mr. Lynn has, with great clearness, relied mainly on Article 47, and I am of opinion that the view put forward by him on the Article is justified. It it a very important Article of the Constitution, and the essence and substance of this Article is the creation of a referendum. A referendum is a most important element in a democratic Constitution, and the substance of a referendum is that in certain cases and in certain circumstances the people themselves are to have a vote to determine whether a law shall be passed or not—that the law shall be finally submitted, in the words of this Article, "to the decision of the people."

In the Constitution we have a series of powers. At the top we have the King, in whom the executive power is vested. We have his representative, who represents him here. We have the Chamber of Deputies—Dáil Éireann. We have the Senate, and we have a very important body—not, I may say, at all similar to any body in England—the Executive Council, appointed by the popular Assembly—by the Dáil. In addition, we have a person corresponding to the Prime Minister in England, appointed by the popular Assembly, the representative House—the Dáil. And he nominates the rest of the Ministry; but, still, those who are nominated and so created are only a Ministry to advise and aid in the executive duty of the State. Now the King has no power to make a law. The representative of the King has no power to make a law. The Chamber of Deputies, by itself, or even with the Senate, cannot make a law. The Executive Council has no power to make a law, and all these together cannot make a law in a case in which the right is given to the people to decide the question; and, therefore, the essential point in the construction of this section is the establishment of the ultimate right of the people to decide in certain cases whether or not a particular measure shall become law. That is the referendum. But what is the effect of the construction that we are asked to accept? First, that there shall be no referendum unless the Executive Minister thinks it right. That is an absolute veto on the referendum. Secondly, that the Crown representative has an absolute veto on the referendum, when even the entire body of them, together with the two Chambers, have not that right. Let us see how it is suggested that this section shall be read. It is suggested that it shall be read in this way: "A referendum shall take place if the President of the Executive Council so directs.

But there shall be no referendum without his direction. The referendum shall take place unless the King's representative puts a veto on it." That is making a farce of the entire thing.

Mr. Sullivan argued that the President of the Executive Council may, if he thinks fit, on the written demand mentioned, within seven days, suspend any Bill—he may do it or he may not. Unless he does it, the rest of the section does not come into operation at all, and therefore it should read: "There shall be a referendum if the President of the Executive Council so directs. There shall be no referendum unless he does." Even if the President of the Executive Council directs the referendum, there shall be no referendum if the King's representative objects. And the fundamental right of referendum to the people, who are to be the final supreme authority in the matter, is converted into an option of the Crown and an option of the Minister.

The section will read thus:—"The King's representative may, if he thinks fit, on the written demand, suspend any Bill. If he does not think fit to suspend, there shall be no referendum." And though the King's representative intervenes to suspend a Bill, yet he may at once veto the referendum. Now, the final clause of Article 47 provides that it "shall not apply to Money Bills [Money Bills are peculiar, because they are entirely within the authority of the Dáil] or to such Bills as shall be declared by both Houses to be necessary for the immediate preservation of the public peace, health, or safety."

In the first place, I reject as ridiculous and absurd a construction that the existence of the referendum is to depend on the ipse dixit of the President of the Executive Council. The Constitution provides that the written demand of two-fifths of the Dáil or of the majority of the Seanad to ensure a referendum can be effectively given within seven days. If any Bill can be made a binding law two minutes after the commencement of the period, that reduces the provisions as to a referendum to a farce. And the only possible mode of giving a real referendum and making this section a real working section is to provide that, except in cases within the proviso at the end, there may be a referendum in every case provided it is asked for within seven days after the Bill has passed; therefore the King is not to have the power to veto the referendum. If this be the true construction, as my Lord Chief Justice has pointed out, the Royal assent to this document within a few hours of its passing the two Houses would be an absolute fraud on the Constitution; and we are bound to treat Article 47 as giving a real referendum. And, in my opinion, the most important point involved in this case is that if we assented to the argument on behalf of the Crown, we would sweep the referendum out of the Constitution. For this reason, I agree with the judgment of the Lord Chief Justice.

Solicitor for Mrs. O'Brien and Mr. Donnelly: *Sean O hUadhaigh.*

Solicitor for the respondents: *M. A. Corrigan* (Chief State Solicitor).

H. J. M'C.

I. F. S. L. C. Wylie J. 1924. Jan. 21.

CLANCY, Tenants; COMMISSIONERS OF NATIONAL EDUCATION, Landlords.

Land purchase — Practice — Compounded arrears of rent — Abated rent — Objection—Land Act, 1923, sects. 19, 22.

Where, pursuant to an agreement in that behalf, a landlord has for a long period allowed an abatement off the rent in respect of money spent by the tenant on the land, the abated rent is the basis on which "compounded arrears of rent" under sect. 19 of the Land Act, 1923, are to be estimated.

Hearing of an Objection by the tenants under sect. 22 of the Act to the particulars furnished by the landlord pursuant to sect. 22, sub-s. 1. For many years the landlords, in pursuance of an old agreement, allowed an abatement of rent to the tenants of so much as the tenants had spent on fertilizers, the amount so spent to be vouched by the tenants. The landlords having claimed the full amount as the rent due, the tenants lodged an objection, claiming that the true rent was the abated rent.

FitzGibbon K.C., for the tenants.

Conner K.C., for the landlords.

Wylie J.:—

Sect. 22, sub-s. 3, of the Act provides that "any question as to whether an agreement for an abated rent was in fact an agreement for a new rent, or any question as to the amount from which the deduction of 25 per cent. is to be made in ascertaining compounded arrears of rent and payment in lieu of rent, shall be determined by the Judicial Commissioner, whose decision shall be final." I must look at the position of the parties. For fifty years the landlord has been only getting the abated rent. The tenants got the benefit resulting from the fertilization of the land; all the landlords got was the benefit of an improved security, and the element of security is now out of the question. If the old unabated rent is to govern the calculations necessary under the Act, the tenants will be in a much worse position than they were ever intended to be, for they will have to pay on the basis of the unabated rent, and further, they must in their own interests and in the course of good husbandry themselves spend money on fertilizers—the very item on which they have been allowed an abatement of rent. Manifestly such a result would be contrary to the intention of the parties, and is also contrary to the intention of the Legislature. It is what the landlord actually got and put in his pocket that is to be considered. I accordingly declare that the abated rent is the true rent.

Solicitor for the tenants: *J. J. O'Connor.*
Solicitors for the landlords: *A. & J. Robinson.*

T. C. T.

JOHN C. WAKEHAM'S ESTATE.

Appeal.
(I. F. S.)
1923.
July 20.

Land Purchase Acts — Holding sold by Land Commission for default — Arrears of poor-rate due — Conditions of sale — Irish Land Act, 1903 (3 *Ed.* 7, *c.* 37), *sect.* 55.

A holding on which arrears of poor-rate were due was put up for sale by the Land Commission for default in payment of the purchase instalments under a condition of sale which provided that "the lands will also be sold subject to any arrears of income tax or other rates, poor-rates, county charges, taxes, and assessments to which they are liable."

Sect. 55 of the Irish Land Act, 1903 (3 Ed. 7, c. 37), provides that "where a holding is put up for sale by or at the instance or with the consent of the Land Commission, the holding shall be sold subject to the purchase-annuity (if any) and any charge under any Public Works Acts, but discharged from all other claims or incumbrances of all persons whomsoever who are interested in the holding, and all such claims shall as from the date of the sale cease as against the holding and attach to the purchase-money in like manner as immediately before the date of the sale they attached to the holding."

Held by the Court of Appeal (Molony C.J. and Ronan and O'Connor L.JJ.) (reversing Wylie J.), that inasmuch as poor-rate was not a charge on the holding, the condition did not contravene the provisions of sect. 55, and was binding on the purchaser.

CLAIM arising on the distribution of the proceeds of a holding sold by the Land Commission.

The holding in this matter, having been put up for sale by the Land Commission for default in payment of the purchase instalments, was bought by Mrs. Mary Carroll, subject to the usual conditions of sale employed by the Land Commission in such cases, including a condition that "the lands will also be sold subject to any arrears of income tax or other rates, poor rates, county charges, taxes, and assessments to which they are liable." Subsequently the rate collector made a demand on the purchaser for arrears of poor-rate, which she paid under threat of distress. She now applied to be repaid out of the proceeds of the sale the sum of £67 19s. 6d., the amount paid by her for arrears of poor-rate due on the holding.

Wylie J. being of opinion that the claim for arrears of rates was one which attached to the purchase-money in accordance with sect. 55 of the Irish Land Act, 1903, and that condition 12 of the conditions of sale under which the Irish Land Commission sold the holding was ultra vires, made an order declaring that the claim for a refund in respect of the payment by the claimant of arrears of rates referred to was a valid charge against the proceeds of the sale of the above holding, and allowed the sum of £67 19s. 6d., as appearing at item 2 on the said distribution schedule in respect thereof.

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WAKEHAM'S ESTATE.

Conner K.C. (with him *Hungerford*), for one of the executors and the residuary legatee under the will of the former owner, appealed to the Court of Appeal (1).

Jellett K.C. (with him *Phelps*), for the Irish Land Commission.

Fitzgerald, for the applicant.

Murnaghan, for the other executors of the will of the late owner.

MOLONY C.J. :—

This is an appeal from an order of Wylie J. in which he held that certain arrears of rates attached to the proceeds of the sale of a holding. The facts of the case are very simple. Mr. J. C. Wakeham held a farm of land in the County of Cork which he had purchased through the Land Commission, subject to a terminable annuity. That annuity was not paid, and the Land Commission, in pursuance of their powers, proceeded to sell the holding for the purpose of realizing the amount of the arrears due to them.

Sect. 38, sub-s. 4, of the Land Law (Ireland) Act, 1896, provides that "where the Land Commission sell a holding, the purchase-money shall, subject to the provisions of sect. 30 of the Land Law (Ireland) Act, 1881, be paid and distributed as if it were the purchase-money of a holding sold by a landlord to a tenant." By the joint effect of these two sections the Land Commission can put up a holding for sale where there are arrears of interest or instalments due to it, and the purchase-money which is thereby realized is to be dealt with by them, and to be paid and distributed as if it was the purchase-money of a holding sold by a landlord to a tenant. The only other section of importance in the matter is sect. 55 of the Irish Land Act, 1903 (3 Ed. 7, c. 37). [His Lordship read the section.]

In this case the Land Commission proceeded to sell this holding under conditions of sale which recognised the existence of the statutory provisions to which I have referred. Condition 11 is that "the lands will be sold subject to the land purchase annuity payable under the provisions of the Land Purchase Acts, to any charge or charges under any Public Works Acts, and subject to all covenants, exceptions, or reservations (if any) set out in the order, deed, or instrument under which the original purchaser derives title, but discharged from all other claims or incumbrances of all persons whomsoever who are interested in the holding, and all such claims shall, as from the date of the sale, cease as against the holding and attach to the proceeds of this sale; but all arrears of the said Land Purchase or Public Works Acts annuities will be discharged by the Commission up to and including the gale days immediately preceding

(1) Before MOLONY C.J., and RONAN and O'CONNOR L.JJ.

the date of sale"; and condition 12 provides that "the lands will be also sold subject to any arrears of income tax or other rates, poor-rates, county charges, taxes, and assessments to which they are liable." At the time of the sale these lands were liable for poor-rates, and the purchaser having paid the purchase-money into Court and got possession, claims to be repaid the sum which she had paid for poor-rate. If the condition which I have read is a good one, the contract has been carried out, and the liability for poor-rate is one she herself undertook. It was contended before Wylie J. that condition 12, so far as it applies to poor-rate, was ultra vires. But that can only be so on the assumption that sect. 55 of the Irish Land Act, 1903, makes condition 12 invalid and inoperative as against a purchaser, even where he has agreed to be bound by it. Before this Act the Land Commission were practically unrestricted as to the manner of sale, or as to what they would sell. But sect. 55 provides that the holding is to be sold subject to the annuity and any charge under any Public Works Acts, "but discharged from all other claims or incumbrances of all persons whomsoever who are interested in the holding, and all such claims shall as from the date of the sale cease as against the holding and attach to the purchase-money in like manner as immediately before the date of the sale they attached to the holding." If it could be shown that this was a charge or incumbrance which attached to the holding before the sale, this section would invalidate any condition binding the purchaser to take the holding subject to any such claim. It, however, has been well settled by a number of cases that, apart from the question of a Civil Bill decree for poor-rate, the liability for poor-rate is not a charge on a holding, but upon the occupier in respect of his occupation of the land. It is not a charge which attaches to the holding either before or after the sale. In this view it does not come within sect. 55, and therefore, in my opinion, it was quite competent for the Land Commission to sell subject to condition 12, the practical utility of which is apparent.

RONAN L.J.: I agree.

O'CONNOR L.J.: I also concur.

Solicitor for the applicant: *Anthony Carroll.*
Solicitors for the residuary legatee: *F. Hall & Son.*
Solicitor for the Irish Land Commission: *H. M. P. Hare.*
Solicitor for other parties interested: *T. H. G. Wallis.*

H. J. M'C.

Appeal.
(N. I.)
1924.

Jan. 28.
Feb. 4.

WILLIAM DUFF *v.* PETER DEVLIN. THE TYRONE LOAN COMPANY, LIMITED, IN LIQUIDATION, AND THOMAS PATTLETON, THE LIQUIDATOR OF SAID COMPANY (1).

Mortgage—Sale—Suit by puisne mortgagee—Parties—Prior mortgagee not a party—Chancery (Ireland) Act, 1867 (30 & 31 *Vict. c.* 44), *sect.* 66, *rule* 9—*County Courts (Ireland) Orders,* 1890, *Order* 18, *rules* 21 *and* 22.

A puisne mortgagee obtained the usual decree in an equity suit in the County Court for sale in lieu of foreclosure. A first legal mortgagee, who had not been made a party either originally or by service of notice of the decree, exercised his statutory power to sell the lands after service on him of an informal cautionary notice.

Held by the Court of Appeal, N.I. (Moore and Andrews L.JJ.), affirming the judgment of Brown J., that the legal mortgagee was entitled to sell the mortgaged property under the power of sale in his mortgage, he not being bound by the decree.

CASE STATED for the opinion of His Majesty's Court of Appeal in Northern Ireland by Brown J. from the County of Tyrone Summer Assizes in July, 1923.

The case stated set out the facts as follows:—

This case came before me, sitting as Judge of Assize at Omagh, Co. Tyrone, in July, 1923, upon an appeal by the Tyrone Loan Company, Limited, and Thomas Pattleton, the liquidator of said company, from an order pronounced by His Honor the County Court Judge of Tyrone in an equity suit setting aside the sale of a farm of land in Ardain, Co. Tyrone, which was sold at Moneymore, in the County of Londonderry, on the 21st day of April, 1923, at the instance of the Tyrone Loan Company, Ltd., and Thomas Pattleton, the liquidator of the said company, to Peter Campbell, of Sessia, Co. Tyrone, for the sum of £700. The appeal was then partly heard at Omagh, adjourned for further hearing to Belfast, and re-heard in Belfast on the 27th July, 1923.

The following facts were proved or admitted:—

The above-named defendant, Peter Devlin (Ogg), holds a farm containing nineteen acres, situate at Ardain, Co. Tyrone, in the Quarter Sessions Division of Dungannon. The annual value of said farm is £14. The above-named plaintiff obtained judgment in the Supreme Court of Judicature (Northern Ireland) against the said Peter Devlin (Ogg) for the sum of £52 15s. 5d. debt and £8 2s. 9d. costs on the 4th day of January, 1922, and registered said judgment as a mortgage against the defendant's said farm on 5th January, 1922. The plaintiff issued an equity civil bill against the said defendant to realize the amount of his judgment mortgage, and obtained a primary decree on the 10th

(1) In the Court of Appeal (N.I.), before MOORE and ANDREWS L.JJ.

day of January, 1923, which directed the Clerk of the Crown and Peace of said county to hold an inquiry as to incumbrances, their priorities, and what was due to the plaintiff and other incumbrancers respectively. And it also directed that upon defendant paying into Court what should be certified to be due to the said incumbrancers, together with costs and interest, within three months after the Clerk of the Crown and Peace should have presented his certificate, the said incumbrancers should reconvey said mortgages to defendant, Peter Devlin (Ogg); but in default of the defendant paying into Court such certified sum, it was ordered that the said lands and premises should be sold by public auction for the discharge of the incumbrances affecting same, subject to the approval of the Court, and that the plaintiff's solicitor should have carriage of the sale, &c.

On or about the 10th day of April, 1923, the said farm was advertised for sale by Messrs. Venables & Byers, of Cookstown, Co. Tyrone, solicitors for the Tyrone Loan Company, at Moneymore, in the County of Londonderry.

On the 14th day of April, 1923, James Duff, solicitor for William Duff, the plaintiff in said suit, sent a letter and notice through the post to Messrs. Bear & M'Keown, the auctioneers, cautioning them against selling said farm, as a primary decree had been granted to the said plaintiff to realize the amount of his judgment mortgage registered against the premises advertised by them for sale. On the 16th April, 1923, a similar notice was similarly sent to Messrs. Venables & Byers.

By letter dated the 16th day of April, 1923, Messrs. Venables & Byers stated they were acting on behalf of the Tyrone Loan Company, Limited, the first mortgagees of the property; that their clients were not parties to the suit, and that they could not see they were in any way bound by said decree.

On the 21st April, 1923, Messrs. Venables & Byers put up said farm for sale by public auction, and sold same to Peter Campbell, of Sessia, for £700 and auction fees.

On the 28th April, 1923, advertisements were issued in a local paper by the Clerk of the Crown and Peace to all persons claiming to be incumbrancers of defendant's farm, asking them (inter alia) to produce their deeds before him at Dungannon Courthouse on 15th May, 1923, for adjudication. The Tyrone Loan Company, Limited, declined to prove their claim.

On the 19th day of May, 1923, the solicitor acting on behalf of the plaintiff herein served a notice of motion on Thomas Pattleton, Esq., the liquidator of the Tyrone Loan Company, Ltd., and on several other parties interested, asking His Honor the County Court Judge for an order setting aside the sale of the defendant's lands and premises, the subject-matter of said equity suit by the Tyrone Loan Company, Ltd., for the following reasons:—"1. That a primary decree was obtained by the plaintiff on the 10th January, 1923, against the said defendant, directing (inter alia) accounts to be taken and ordering a sale of

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said lands and premises. 2. That some days prior to the date of said sale a notice of the primary decree granted by this honourable Court had been served on Messrs. Venables & Byers, solicitors having carriage of the sale for the Tyrone Loan Company, Ltd., and on Messrs. Bear & M'Keown, their auctioneers; and after said sale a similar notice was served on Peter Campbell, the purchaser of said lands and premises. 3. That notwithstanding said notice, the Tyrone Loan Company, Ltd., put up said lands for sale by public auction at Moneymore, in the County of Londonderry, a small town about eight miles distant from the neighbourhood where said lands are situate, and sold said farm at an undervalue, namely, £700, to Peter Campbell, of Sessia, who is closely related to the defendant in this suit. 4. That said sale is an unwarrantable interference with the course of justice whilst this suit is pending in this honourable Court." Said application was grounded on the affidavits of William Duff, the plaintiff, Patrick Hagan, and John Doris, a puisne mortgagee, which were duly filed in Court, and on the oral evidence of said John Doris.

On the 31st day of May, 1923, the notice to set aside the sale was heard at Cookstown Quarter Sessions, and adjourned to the 6th June at Dungannon Sessions, when His Honor the County Court Judge gave judgment setting aside the sale, with costs against the Tyrone Loan Company, Ltd., and Thomas Pattleton, the liquidator of said company.

The Tyrone Loan Company, Ltd., and Thomas Pattleton, the liquidator of said company, appealed against this order to the Judge of Assize at Omagh. By the notice of appeal the appellants expressly saved their preliminary objection as follows: "Without prejudice to the objection of the appellants to the jurisdiction of the learned County Court Judge to make the order appealed against."

Notice of decree was not served by plaintiff on the Tyrone Loan Company and Thomas Pattleton in accordance with rule 9 of sect. 66 of the Chancery (Ireland) Act, 1867, and rules 21 and 22 of Order 18 of the County Courts (Ireland) Orders, 1890.

The appeal was partly heard by me at Omagh Assizes, and adjourned to the 27th day of July at Belfast, when, after hearing counsel on both sides, I gave judgment for the Tyrone Loan Company and Thomas Pattleton, and reversed the order of the learned County Court Judge, and dismissed said motion with costs, as set out in said order, to which I refer, and which is incorporated herewith. I gave special leave to plaintiff to appeal to the Court of Appeal by way of case stated.

Murphy K.C. and *Porter*, for the plaintiff, William Duff:—

If the sale is set aside, the rights of the first and puisne mortgagees will be safeguarded. The suit was rightly constituted in the first instance. The order made by the County Court Judge setting aside the sale was right, as there had been inter-

ference with the Court in the exercise of its jurisdiction. The question is, was there title in all the circumstances in the first mortgagee to sell? We submit there was not. There was unwarrantable interference with the course of administration in the County Court, and this Court should be slow to interfere with the exercise of the County Court Judge's discretion. In the Chancery Division it is the settled practice to make a prior mortgagee a party: *Hunter* v. *M'Connell* (1). We submit that the order of Brown J. should be reversed. [They also referred to *Hardman* v. *Leech* (2).]

Baxter K.C. and *M'Coy*, for the Tyrone Loan Company:—

No formal notice of the decree was served on us, as required by Order 18, rules 21 and 22, of the County Court (Ireland) Orders, 1890. We are entitled to sell as first mortgagees. No question of contempt can arise, nor of undervalue. A mortgagee selling under his power is not a trustee of the power of sale. *Hunter* v. *M'Connell* (1) dealt only with the question of the constitution of a suit, and *Hardman* v. *Leech* (2) was an administration suit. We rely on *In re Beauclerk's Estate* (3), and especially on the words of the judgment of Ross J. at p. 80. The County Court Judge had no jurisdiction to set aside this sale. [They also referred to *Kelly* v. *Rice* (4) and *Reg.* v. *Lefroy* (5).] The point as to want of jurisdiction was made before the County Court Judge.

Cur. adv. vult.

Feb. 4.

MOORE L.J.:—

The net point for this Court to decide is a short one, and is whether or not a prior legal mortgagee is entitled to sell the mortgaged property under the power of sale in his mortgage after a decree for sale has been made in a suit brought by a puisne mortgagee, of which suit the first mortgagee has knowledge, but to which he has not been made a party originally or by notice, or is not otherwise bound.

Prima facie a mortgagee can pursue all his remedies concurrently. But in my opinion he cannot do so after he has been made a party to a suit in which there has been an order for sale or administration. I think this is clear from the judgment of Farwell J. in *Stevens* v. *Theatres, Limited* (6), and the ground of that decision—in a case where the mortgagee, who was plaintiff in a foreclosure suit, exercised his power of sale out of Court—was thus expressed, pp. 860–61: "Now, if the plaintiff cannot get rid of his action after judgment, because the judgment is for the benefit also of the defendants, it must follow that he cannot in any way vary the form of that judgment by doing an

(1) 17 L. R. I. 56.
(2) I R 8 Eq. 400.
(3) [1907] 1 I. R. 76.
(4) 38 I. L. T. R. 193.
(5) 8 Q. B. 134.
(6) [1903] 1 Ch. 857.

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act which would put it out of his power to perform that which the Court has directed him to do as a condition of getting the judgment." This reasoning must equally apply to all parties to the suit. But these considerations do not extend to the position of a mortgagee who stands outside the suit, never having been made a party either in the framing of the action or by service of the order. This appears as a necessary inference from the case of *Armstrong* v. *Dickson* (1). There the Court (Meredith M.R.) directed that the prior mortgagee should be served with notice of the order for sale in order that he should be thereby bound.

The other questions in that case do not arise in the present one; but the whole of the authority asserted by the Master of the Rolls over the first mortgagee is derived from the fact that there was power to bind him as a notice party to the action, and that this had been done. It would follow from this that, notwithstanding the decree, the Court would not have had such authority had the first mortgagee remained a stranger to the suit.

Holding, therefore, that the Tyrone Loan Company, Ltd., were at liberty to exercise their power of sale on April 21st, 1923, at which date they had not been made parties to the suit or served with notice of any order, I think the order of Brown J. was right, and that we should affirm it.

ANDREWS L.J.:—

I have not entertained any doubt from the opening of the arguments in this case that the order of Brown J. should be affirmed.

The plaintiff, who is a puisne judgment mortgagee for the sum of £52 15s. 5d. and costs, instituted the proceedings in this matter by way of equity civil bill to raise the amount of his judgment mortgage. Peter Devlin, the owner of the equity of redemption, was made sole defendant. It was quite competent for the plaintiff under sect. 66, rule 7, of the Chancery (Ireland) Act, 1867, to constitute his suit in this manner, and to obtain a decree for sale without making the appellants or any other mortgagee defendants, or serving them with the civil bill: see also *Hunter* v *M'Connell* (2). Rule 9 of the same section provides that in such case all persons who according to the practice of the Court, previous to the passing of the Court of Chancery (Ireland) Regulation Act, 1850, would have been necessary parties to the suit, should be served with notice of the decree; and after such notice they should, unless cause be shown to the contrary, . . . be bound by the proceedings in the same manner as if they had been originally made parties to the suit; and any party so served may within the prescribed time apply to the Court to add to or vary the decree. Such notice of decree must under Order 18, rule 22, of the County Courts (Ireland) Orders, 1890, be prepared

(1) [1911] 1 I.R. 435.

(2) 17 L.R.I. 56.

by the Clerk of the Peace or Registrar. Brown J. has found as a fact in the case stated that no such notice was served on the Tyrone Loan Company. In lieu of such notice the plaintiff served another notice, dated 14th April, 1923, prepared and signed by his own solicitor, in which, referring to the decree directing a sale of the lands, he cautioned the appellants, their auctioneers, and solicitors against selling or letting the lands. An intended sale had been advertised on 10th April to take place on 21st April. The appellants and their advisers disregarded the cautionary notice, proceeded with the sale, and sold the farm to one Peter Campbell for £700.

It was not until 19th May, almost a month later, that a notice of motion was served in this matter on behalf of the plaintiff on the appellants, asking for an order setting aside the sale on the grounds (*a*) that the decree had been obtained by plaintiff on 10th January, 1923; (*b*) that the cautionary notice of 14th April, 1923, had been served; (*c*) that the lands had been sold at an undervalue; and (*d*) that the sale was an unwarrantable interference with the course of justice whilst this suit was pending. Before the County Court Judge the preliminary point was taken on behalf of the appellants, that the Court had no jurisdiction in this matter to make the order sought. The Judge ruled against the point, and the appellants expressly reserved it in their notice of appeal. It does not appear from the case stated what opinion Brown J. formed upon this point; but I am clearly of opinion that it is sound. The plaintiff's contention is that he, a mere puisne mortgagee, can in this mortgage suit, in which the mortgagor is sole defendant, obtain an order setting aside or restraining a sale made by a first mortgagee in exercise of his statutory right, though such first mortgagee is not a defendant, has not been served with notice of the proceedings, nor submitted in any way to the jurisdiction of the Court. In my opinion, if the plaintiff were entitled to an order setting aside the sale, it could only be obtained in a plenary suit, where the issues to be tried could be properly knit, and witnesses could be orally examined and cross-examined. When pressed on this point, Mr. Murphy submitted on behalf of the plaintiff that the motion was in reality one for contempt of Court. Whilst I have the greatest doubts as to whether the County Court Judge would have any jurisdiction to deal with the matter as a contempt of Court, since the alleged contempt was not committed in the face of the Court, it is unnecessary for me to determine this point, as the motion is neither in form nor in substance a motion for contempt of Court; and I am accordingly of opinion that it was entirely misconceived.

This would be sufficient to dispose of the case; but I feel it only right to express my opinion as briefly as possible on the other points which were argued before us. In the first place, it is contended that the appellants are bound by the decree of 10th January, 1923. It is obvious that under rule 9 they are not

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so bound, unless the prescribed notice of decree be served, and it be not varied within the prescribed time. No such notice was served. On this point the judgment of Meredith M.R. in *Armstrong* v. *Dickson* (1) is clear and instructive. In the next place, the sale is challenged on the ground that the lands were sold "at an undervalue." In support of this contention an affidavit has been made by John Doris, the second mortgagee for a sum of £235, and accordingly a very interested party, who expresses the opinion that in a free and open market, with reasonable competition, the farm should sell at £1,000. The soundness of this opinion is, of course, challenged; but, even if it were accurate, it would not justify us in setting aside the sale. As Kay J. pointed out in *Warner* v. *Jacob* (2): "A mortgagee is, strictly speaking, not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realize his debt. If he exercises it bona fide for that purpose, without corruption or collusion with the purchaser, the Court will not interfere even though the sale be very disadvantageous, unless, indeed, the price is so low as in itself to be evidence of fraud." The evidence falls far short of these requirements in the present case. Lastly, the sale is attacked as being an unwarrantable interference with the course of justice. Such a contention must be regarded as obviously unsustainable when it is remembered that the appellants were in no way bound by the decree for sale, and in acting as they did were merely exercising their statutory right; a right which it is well settled will not, as a general rule, be interfered with by the Court, provided the mortgagee keeps within the terms of his power: *Colson* v. *Williams* (3).

For all these reasons the order of Brown J. must be affirmed with costs, including the special fees of £2 and £2 2s. provided for by Order 65, rule 84.

Solicitor for the plaintiff: *James Duff.*

Solicitors for the Tyrone Loan Company, Ltd.: *Venables & Byers.*

J. M'C.

(1) 1911] 1 I. R. 435, at pp. 438-439. (2) 20 Ch D 220, at p. 224.
(3) 58 L. J Ch 529.

ESTATE OF COL. LOFTUS BRYAN, Co WEXFORD.

L. C.
Wylie J.
1923.
Dec. 18.

Landlord and tenant—Compounded arrears of rent—Method of calculation—Land Act, 1923 (I.F.S., No. 42 of 1923), sect. 19.

The amount of compounded arrears of rent under sect. 19, sub-s. 2, of the Land Act, 1923, is the actual amount of the arrears of rent due, less by 25 per cent. calculated on the amount so due.

MOTION on behalf of forty-six tenants on the Kilmuckridge Estate, County Wexford, of Col. Loftus Bryan, for an order directing the Irish Land Commission to amend the particulars of rent and arrears of rent of this estate on the grounds that the particulars did not show customary and other abatements of rent, and also that the compounded arrears payable by the tenants to the Land Commission under sect. 19, sub-s. 2, of the Land Act, 1923 (I.F.S., No. 42 of 1923), were calculated on a wrong basis. The particulars were based on the schedule of rent and arrears of rent furnished by the landlord to the Irish Land Commission.

The tenants disputed the accuracy of the landlord's schedule on the grounds that since (approximately) the year 1886 the tenants had had a permanent abatement of 15 per cent. off their rents (and in four particular cases an abatement of 35 per cent.), and that the landlord had returned the full old rent as the correct rent payable by the tenant. In addition, some of the tenants had been allowed 15s. per annum in respect of cottage plots taken compulsorily under the Labourers (Ireland) Acts, and the landlord returned this allowance in the rent.

Conner K.C. and *James Geoghegan*, for some of the tenants, claimed the abatements mentioned.

Swayne K.C., for the landlord :—

I have looked into this matter on behalf of the landlord, and I am satisfied that the basis should be the abated rent.

Conner K.C. :—

I think my friend, Mr. Swayne, has exercised a very wise discretion. For over forty years the tenants have paid abated rents. The rent-books were very carefully kept, but no matter what abatements or allowances they were entitled to or what reduction was made in the rent, the old amounts were always kept in the books as rent, although they were not rent. In a large number of cases there are allowances for labourers' cottages, but in the books they were not allowed for, but of course that was not the rent at all. They must go.

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WYLIE J.: They must go off, of course.

Conner K.C.: I should like to know what the procedure is exactly. Does your lordship make an order with reference to the abatements with a view to settling the actual figures?

WYLIE J.: I will hold that there is a consent, and the order I will make is: "By consent, the parties agree that the abated rent shall be deemed to be the rent—the true rent—of the premises. The amount of the abatement to be settled by agreement, and failing agreement, the cases to be re-listed before me."

Conner K.C.: That is the principal point. The second question is as to the method of calculating compounded arrears under sect. 19, sub-s. 2, of the Act. The sub-s. enacts: "Compounded arrears of rent shall be a sum equivalent to the total rent and arrears of rent due on the gale day next preceding the passing of this Act in respect of rent accrued since the first gale day in the year 1920 less a reduction of 25 per cent.: provided that any payments made by the tenant after the second gale day in the year 1920 shall be appropriated to the rent which accrued since the first gale day in that year. In any case, where a hanging gale is customary, any payment of rent shall be deemed to have been made in respect of the gale next after the gale in respect of which it was actually made." The deduction of 25 per cent. refers to the amount of rent accrued since the first gale day in 1920, with the result that the tenant at £100 a year who paid his rent from the first gale day in 1920 to May, 1923, would have been entitled to a deduction of three times £25 against the landlord. But the Act does not bind the landlord to give back anything. Although it gives the tenant in arrear the advantage of the rent being calculated in that way, there is nothing enabling the tenant who has paid his rent to get back the difference. The first words of the sub-s.: "Compounded arrears of rent shall be a sum equivalent to the total rent and arrears of rent due on the gale day next preceding the passing of this Act in respect of rent accrued since the first gale day in the year 1920 less a deduction of 25 per cent.," refer to the amount of rent accrued since the first gale day in 1920. From the amount of all rent accrued due from the first gale day in 1920 should be deducted first 25 per cent., and from the sum so arrived at should be deducted the amount which the tenant has actually paid for that period.

Dickie K.C. (with him *Hector Hughes*):—

The method of calculation suggested by Mr. Conner is based on an exact construction of the Act. If the opposite meaning were intended the sub-s. should read: "Compounded arrears of rent shall be a sum equivalent to the total rent and arrears of rent due on the gale day next preceding the passing of this Act less 25 per cent. in respect of the rent accrued since the first gale day of 1920." Read in that way in respect

of the amount accrued since the first gale day in 1920, less the reduction of 25 per cent., it would be absolutely fair for all the tenants, except the individual tenant who had paid all his rent. Apart from that, the true construction of the sub-s. as it stands is that the 25 per cent. should be deducted from the whole of the rent for the three years from the first gale day in 1920, and not from the balance remaining after deducting any payments that had been made since then. Under the first method, if the rent were £100 a year, and three years' rent, £300, had accrued due under the Act, and £100, one gale, was paid, if 25 per cent. were taken off the whole rent of £300, there would remain a sum of £225, and deducting from that £100, the amount of the compounded arrears payable by the tenant would be £125. But according to the second contention, if the £100 were deducted from the £300 in the first instance, it would leave a balance of £200; take 25 per cent. off that and the result would be £150 as the amount of the compounded arrears to be paid. This method would penalise the tenant who had paid most regularly.

WYLIE J.:—

I have no doubt what the meaning of the section is. Ascertain the amount of the rent, and then ascertain the amount which is still due, and from the amount which is still due take 25 per cent. I think that I cannot put it in any plainer words. I do not agree at all with Mr. Dickie's suggestion. It is very interesting, but if followed out would lead to the most appalling confusion. As the matter dealt with in the Notice of Motion as being really in dispute between the landlord and the tenants was the question as to whether the old rents or the new abated rents should be the basis of the purchase, I shall allow the tenants twenty-five guineas costs against the landlord.

Solicitor for the landlord: *Edward White.*
Solicitor for some of the tenants: *T. B. Dunbar.*
Solicitor for the remaining tenants: *William Caulfield.*

H. H.

L. C.
Wylie J.
1924.
Feb. 19.

ESTATE OF FRANK J. SHIRLEY, Co. Monaghan.

Landlord and tenant—Land Purchase Act, 1923 (*I.F.S., No.* 42 *of* 1923), *sect.* 19—*Rent—Compounded arrears—Method of calculation.*

The tenant of a holding on an estate to which the Irish Land Act, 1923 (I.F.S., No. 42 of 1923), applied, on the 8th November, 1920, being the second gale day in 1920, paid £37 11s., being one year's rent, and was given a receipt for the rent due up to the 1st November, 1920. Otherwise he owed £93 17s. 6d., arrears of rent on the 1st May, 1923, being the gale day next preceding the passing of the Act. The Irish Land Commission, in the particulars of rent and arrears, appropriated the payment made by him after the second gale day in 1920 to the rent which accrued due since the first gale day in that year, and giving him credit for one-half year's rent out of the one year's rent paid by him on the 8th November, 1920, returned his arrears due on 1st May, 1923, as £75 2s. The landlord applied to amend the particulars by setting out the arrears as £93 17s. 6d. instead of £75 2s.

Held, that the particulars were correct, and should not be amended, as the words of sect. 19, sub-s. 2, clearly enacted that any payments made by the tenant after the second gale day in 1920 should be appropriated to the rent which accrued since the first gale day in that year.

Motion on behalf of Frank J. Shirley, the owner of an estate in Co. Monaghan to which the Land Purchase Act, 1923 (I.F.S., No. 42 of 1923), applies for an order directing the Irish Land Commission to amend the particulars of rent and arrears of rent of this estate, due to the 1st of May, 1923, in respect of the holding of Bernard Kelly, jun., on the townland of Leeg, part of the above estate, so that the amount of rent and arrears due in respect of the said holding on the 1st May, 1923, will be set forth as being the sum of £93 17s. 6d., instead of the sum of £75 2s.

The holding was held under order of the Irish Land Commission, dated 21st November, 1913 (Record No. 6136), at the yearly rent of £37 11s.; and in respect of the said holding the landlord received from the tenant on the 8th November, 1920, the sum of £37 11s., being the amount of one year's rent due up to the 1st November, 1920, and gave a receipt in those terms. The amount of arrears due to the 1st May, 1923, as returned by the landlord in his schedule of arrears, was £93 17s. 6d., as he gave no credit for any part of this payment. The Land Commission, however, in calculating the arrears due, appropriated out of the said payment one-half year's rent in reduction of the arrears, and in their particulars of rent and arrears returned the arrears due to the same date as £75 2s.

Jellett K.C. and *Newett*, for the applicant:—

The amount received by the applicant in respect of the holding on the 8th November, 1920, cannot be deemed to be a payment in respect of any rent except the rent specified in the

receipt given by the landlord to the tenant. The appropriation mentioned in the section is an appropriation as of the date when the payment was made, and should not be prospective. The section should not be construed as having a retrospective effect so as to reopen a concluded transaction. The particulars of the compounded arrears due in respect of the holding, as stated in the schedule of arrears returned by the landlord to the Land Commission, are correct, and the Land Commission should therefore amend the figures in the slip attached to the receivable order issued in respect of the holding so as to bring such figures into conformity with those in the schedule of arrears.

Lavery, for the tenant:—

The particulars filled in by the Irish Land Commission are correct. The payment made by the tenant after the second gale day in 1920 should be appropriated to the rent which accrued due since the first gale day in that year, namely, one-half year's rent. The remainder should be, as it was, appropriated in reduction of arrears: sect. 19, sub-s. 2.

WYLIE J:—

I am not concerned with the results which follow from a particular construction, but only with the clear words of the Act. Sub-s. 2 of sect. 19 enacts that "compounded arrears of rent shall be a sum equivalent to the total rent and arrears of rent due on the gale day next preceding the passing of this Act in respect of rent accrued since the first gale day in the year 1920, less a deduction of 25 per cent.: provided that any payment made by the tenant after the second gale day in the year 1920 shall be appropriated to the rent which accrued since the first gale day in that year." I waited to hear what words could have been introduced into the statute which would have been clearer. Mr. Newett says that the appropriation should be made only when the payment made is not greater than the arrears accrued since the first gale day in 1920. I can imagine the legislature putting in some such words as those suggested by Mr. Newett, but I cannot imagine any Judge reading them into the Act. I am compelled by the section to the result that the tenant asks for. The section provides that any payments made by the tenant after a certain day should be appropriated to the rent which accrued since the first gale day in 1920. There can, to my mind, be no question as to the meaning of the section. The wording of the Act is perfectly plain, and it clearly marks the manner in which payments should be appropriated. I must refuse Mr. Jellett's motion with costs.

Solicitors for the landlord: *George Fottrell & Sons.*
Solicitors for the tenant: *Charles MacMahon & Sons.*

H. H.

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1924.

Feb. 19.
Feb. 22.

GRAHAM *v.* BOGLE AND MILLS.

(1923. No. 72.)

Practice — Discovery — Affidavit of documents — Privilege — Pre-existing document handed to solicitor for advice—Professional communications—Inspection by Court—R.S.C., 1905, *Or.* 31, *r.* 20 (2).

In an affidavit of documents defendants claimed privilege for a document described as "Memoranda or notes of deceased written in a book, and given by deceased to her solicitor in connexion with the instructions for her will." The defendants were the executors of the deceased.

Held, that the Court was entitled under Or. 31, r. 20 (2), to inspect the document for the purpose of deciding on the validity of the claim of privilege; and that the document being obviously a pre-existent one, and not compiled as instructions for the solicitor, was not privileged, though handed to him for the purpose of obtaining legal advice.

MOTION by the plaintiff for an order on the defendants to produce for the plaintiff's inspection a document admitted to be in the possession of the defendants by the affidavit of documents, but for which they claimed privilege.

The action was brought by the plaintiff against the defendants as executors of one Sarah Greacen, deceased, to have it declared that certain securities registered in the name of the deceased were the property of the plaintiff.

The plaintiff applied for and obtained an order for discovery of documents by the defendants. In their affidavit of documents the defendants stated: "We object to produce the documents set forth in the second part of the first schedule hereto. The last-mentioned documents consist solely of professional communications of a confidential nature, which for the purpose of deceased in her lifetime obtaining . . . legal advice, have passed between deceased in her lifetime and her solicitor, Major Fitzgerald." One of the documents was described as "Memoranda or notes of deceased written in a book, and given by deceased to her solicitor, Major J. G. E. Fitzgerald, in connexion with the instructions for her will."

The plaintiff asked that, notwithstanding the objection, the defendants might be ordered to produce the said memoranda for inspection by the plaintiff.

In an affidavit filed to resist the motion, Major Fitzgerald stated that the said document "was written out by deceased in her own handwriting, and was handed to me as her solicitor and confidential adviser for the purpose of obtaining my advice thereon, and for the purpose of advising deceased as to the preparation of her will, and as instructions or part of the instructions for the preparation of deceased's will."

A. Black, for the plaintiff:—

The document is not privileged. A document already in existence does not become privileged merely because it is handed to a solicitor for the purpose of advice: *Pearce* v. *Foster* (1); Annual Practice, 1924, at p. 494. The affidavit of Major Fitzgerald is at best ambiguous as to whether the document in question was a pre-existing document or was compiled by the deceased for the express purpose of being submitted to her solicitor for advice; and an ambiguous affidavit should be read most strongly contra proferentes. The Court is entitled under Order 31, r. 20 (2), to inspect the document for the purpose of deciding upon the claim of privilege, and ought to inspect the document in such a case as the present one: *Birmingham and Midland Motor Omnibus Company, Ltd.*, v. *London and North-Western Railway Company* (2).

M'Coy, for the defendants:—

The statements in the affidavits are conclusive, and the Court cannot in the absence of fraud, which is not suggested, order production: *Jones* v. *Monte Video Gas Co.* (3); *O'Rourke* v. *Darbishire* (4). The present case is not one in which the Court should inspect the document, inasmuch as the validity of the claim of privilege does not depend upon the contents of the document. The power of inspection under Order 31, r. 20 (2), should only be exercised in cases of suspicion.

Cur. adv. vult.

ANDREWS L.J. (sitting for WILSON J.):—

The practical application of the rule so well established in *Jones* v. *Monte Video Gas Co.* (3) and other cases as to the conclusive character of an affidavit of documents and of such claim for privilege as it contains has been materially affected by the addition to our rules of Order 31, r. 20 (2), which provides that where, on an application for an order for inspection, privilege is claimed for any document, it shall be lawful for the Court or a Judge to inspect the document for the purpose of deciding as to the validity of the claim of privilege. The salutary character of this new rule could not be better illustrated than by the facts of the present case.

The defendants, in their affidavit of documents, claimed privilege for, inter alia, "Memoranda or notes of deceased written in a book and given by deceased to her solicitor, Major J. G. E. Fitzgerald, in connexion with the instructions for her will." These words, it will be noted, are not merely descriptive of the document, but also of the circumstances from which the privilege is alleged to spring. Privilege is claimed in paragraph 3 of the affidavit for all the documents contained in the privileged

(1) 15 Q. B. D. 114, at pp. 118–119.
(2) [1913] 3 K. B. 850.
(3) 5 Q. B. D. 556.
(4) [1920] A. C. 581.

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schedules. It was contended that the document of which inspection is sought was properly described in that paragraph as "professional communications of a confidential nature, which, for the purpose of deceased in her lifetime obtaining . . . legal advice, passed between deceased in her lifetime and her solicitor, Major Fitzgerald." At the request of counsel for the plaintiff, I inspected the document, and am satisfied that it can in no proper sense be described as a "professional communication" passing between deceased and her solicitor for the purpose of deceased obtaining legal advice. The appropriate words of the privilege plea, obviously intended by the draftsman to cover the document in question, are "Memoranda from deceased in her lifetime to her said solicitor for her will."

In his affidavit opposing this application, the defendant's solicitor, answering the plaintiff's challenge as to the right to claim privilege, refers with greater particularity to the document, and says that it "was written out by deceased in her own handwriting, and was handed to me as her solicitor and confidential adviser for the purpose of obtaining my advice thereon, and for the purpose of advising deceased as to the preparation of her will, and as instructions or part of the instructions for the preparation of deceased's will."

I must not be understood as deciding that it is competent for a party upon whom a notice of motion of this character has been served to amplify in his affidavit opposing the motion a plea of privilege which has been inadequately expressed in his affidavit of documents: but even assuming the right to do so, the paragraph referred to is, as Mr. Black pointed out, ambiguous, in that it is not clear whether it was intended to convey that it was both written and handed by deceased to her solicitor for the purpose of obtaining his advice, or whether it came into existence for a wholly different purpose, and was merely handed to the solicitor for the purpose of obtaining his advice. On the authorities the distinction is one of substance. It was this ambiguity which made it clear to me that it was my duty to look at the document itself, and an examination of it leaves no doubt in my mind that it was prepared by the deceased as a record of her investments and of the dividends from time to time received thereon, and not, as is suggested, as memoranda upon which to obtain her solicitor's advice when he was preparing her will. No doubt it was handed by the deceased to her solicitor when drawing the will, as it contained a list of her investments in a convenient form; but that this does not make it a privileged document is made abundantly clear by the case of *Pearce* v. *Foster* (1). In his judgment Brett M.R., at pp. 118-119, referring to the documents for which privilege was there claimed, said: "It seems to me, therefore, that they fall within the class of documents with regard to which there is a professional privilege, on the ground that they are brought into existence for the purposes

(1) 15 Q.B.D. 114.

or in the course of professional communications between solicitor and client. I do not think that, where documents are already in existence aliunde, the mere fact of their being handed to a solicitor for the purposes of the conduct of the action can create a privilege; but where documents are brought into existence by a solicitor or through a solicitor for the purposes of consultation with such solicitor, with a view to his giving professional advice or to the conduct of an action, these are in the nature of professional communications, and are as such privileged."

This statement of the law is in no way affected by the decision of the House of Lords in *O'Rourke* v. *Darbishire* (1), to which I have been referred by Mr. M'Coy, and which only affirms the well recognised principle that the true test of privilege is the circumstances in which the document came into existence; or, as Hamilton L.J. put it in *Birmingham and Midland Motor Omnibus Co., Ltd.*, v. *London and North-Western Railway Co.* (2): "Privilege flows from the existence of a certain matter of fact, namely, the purpose for which the documents were created." It would be absurd to say that a document of, say, an implicating character, such as an adverse report of a railway official to the company of an accident, could be protected under a plea of privilege merely by subsequently handing it over to the company's solicitor, who had nothing directly or indirectly to do with its preparation.

For these reasons I am of opinion that the plea of privilege in this case fails. I decide nothing as to the relevancy of the document or as to its admissibility in evidence at the trial. It is sufficient for the purpose of this motion that its relevancy is admitted by the defendants by its inclusion in the affidavit of documents. I am likewise unconcerned with its value to either party, which at the most would appear to be of a purely negative character. I deal merely with the legal issue involved, and make an order in the terms of the notice of motion with costs.

Solicitors for plaintiff: *J. & A. Caruth & Owens.*
Solicitor for defendants: *J. G. E. Fitzgerald.*

J. M'C.

(1) [1920] A. C. 581. (2) [1913] 3 K. B. 850, at p. 857.

M. R. (*I. F. S.*) 1924.

Jan. 14. Feb. 1.

Appeal. (*I. F. S.*) 1924.

Mar. 4, 6.

In the Matter of the Estate of PATRICK COLLINS, Deceased. Between ELLEN COLLINS, Plaintiff; and NORAH and HUGH COLLINS, Defendants.

(1922. No. 101.)

Administration — Freehold lands — Estate pur autre vie — Agreement to purchase under Land Purchase Acts—Death of tenant before vesting— Registration of Title (Ireland) Act, 1891 (54 & 55 *Vict. c.* 66), *sect.* 84— *Land Law (Ireland) Act,* 1896 (59 & 60 *Vict. c.* 47), *sect.* 32 — *Devolution.*

A tenant of an estate pur autre vie agreed to purchase his holding under the Land Purchase Acts, but died before the lands had been vested or registered. The advance of the purchase-money had previously been sanctioned.

Held by the Court of Appeal, affirming O'Connor M.R., that on the death of the tenant intestate the lands, although freehold, devolved as personalty. *M'Donnell* v. *Stenson* ([1921] 1 I.R. 80) followed.

Originating Summons for administration adjourned into Court, for the purpose of determining whether certain lands held by the deceased were to be treated for the purpose of administration as personal estate.

By lease dated 29th April, 1853, the Rev. John Jameson granted part of the lands of Mullaghmore East, containing 220 acres statute measure, situate in Co. Galway, to Hugh Collins, his heirs, executors, administrators, and assigns, for the lives of Hugh Collins, Patrick Collins, and Michael Collins, or 31 years, whichever should last longest, at the yearly rent of £51 8s. 10d. Hugh Collins by his will, dated November 22nd, 1900, bequeathed to his son Patrick all his farm and lands wherever situate. Hugh Collins died on 13th August, 1906, and Patrick entered into possession. The landlord of said lands, M. E. F. B. Jameson, applied to the Land Commission to purchase the said estate, including the holding of Patrick Collins, under sect. 6 of the Land Purchase (Ireland) Act, 1903. In pursuance thereof the Land Commission got from Patrick Collins, on April 23rd, 1917, an undertaking to purchase the lands for the sum of £1,190 in case the Land Commission should purchase same under the provisions of the Land Purchase (Ireland) Act, 1903. On May 21st, 1917, the Land Commission agreed to purchase the estate of M. E. F. B. Jameson, including the holding of Patrick Collins. Before any vesting order had been executed, Patrick Collins died intestate on 13th October, 1921. The surviving cestui que vie in the lease of 1853 died on 23rd January, 1923.

W. G. Shannon, for the plaintiff:—

The agreement with the Land Commission operated to convert the land into personal estate, and therefore it devolved as such on his next-of-kin. I rely on sect. 84 of the Local Registration of Title Act, 1891; also *M'Donnell* v. *Stenson* (1); *In re Marley* (2); *Earl of Mountcashel* v. *More-Smyth* (3).

(1) [1921] 1 I.R. 80. (2) [1915] 2 Ch. 264. (3) [1896] A. C. 158.

C. Norman Kough, for the defendants:—

In this case there has been no registration. The real question is whether I am entitled as heir-at-law or special occupant. The Registration Acts cannot affect me unless and until the lands are registered, and no registration can be effected till a vesting order has been executed: *In re Lynders* (1).

FitzGerald Kenny, for the personal representative of Patrick Collins.

O'CONNOR M.R.:—

This is a suit for the administration of the personal estate of Patrick Collins, deceased, who died intestate; and the question has arisen whether a farm of land the property of the deceased formed part of his personal estate. The contest is between the heir-at-law and the next-of-kin.

The farm was held by the deceased under a lease for three lives and the survivor of them, or for the term of thirty-one years, whichever should longest last. The demise was to the lessee, his heirs, executors, administrators, and assigns, with the reservation of a rent. At the date of the death of the intestate the term of years had expired, and one of the lives was still in existence. In this state of facts, apart from special circumstances, the leasehold interest would have devolved on the heir-at-law as special occupant. But we have to consider whether the agreement by the deceased in his lifetime to purchase his holding under the Land Purchase Acts had any effect on the devolution of the lands on the death of the deceased. He became the purchaser in the following way:—The Land Commission had agreed to purchase the landlord's estate under the provisions of sect. 6 of the Irish Land Act, 1903. This necessitates the previous execution of undertakings by a certain proportion of his tenants to purchase their holdings from the Land Commission. The required number of tenants, including the deceased, did give such undertakings, and the sales went through. The undertaking given by the deceased was executed on the 23rd April, 1917, and by it he undertook to purchase his holding at the price of £1,190. It is admitted that on the purchase by the Land Commission of the landlord's estate on the basis of the undertakings by the tenants the deceased became entitled and was bound to purchase his holding from the Land Commission. Such was the situation on the death of the deceased, which occurred on the 13th October, 1921.

I have now to consider what the effect of the purchase on the estate of the deceased tenant was. He was immediately before the purchase the owner of a freehold descendible to his heir as special occupant. He then enters into an agreement to purchase the fee. That agreement was unconditional in character, and binding upon all parties. Being unconditional, I would hold, if

(1) [1910] 1 I. R. 231.

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it were necessary so to decide, that it immediately effected a conversion of the deceased's estate from a quasi freehold to a fee-simple; but whether there was a conversion or not, the devolution of the estate on the death of the deceased was unaffected by the agreement to purchase. If the estate remained a quasi freehold, it descended upon the heir as special occupant; if it had been converted into a fee-simple, it descended to the heir as heir-general. In either case the next-of-kin acquired no interest. So far I have looked at the case as it stood immediately after the death of the deceased, and in considering it I may say that I have not overlooked sect. 32 of the Act of 1896, which enacts that an agreement for purchase shall not operate to convert the interest of the purchaser into real estate—a section which plainly applies only when the tenant purchaser is the owner of a chattel interest. In the present case the tenant purchaser was the owner of a freehold.

On the 23rd January, 1923, the surviving life in the lease dropped, and whoever had been then entitled to the leasehold interest became entitled to any rights which were acquired under the purchase agreement. That was the heir of the deceased, whether as special occupant or heir-general. But it is said that inasmuch as the deceased had entered into a contract which he and those claiming under him were bound to complete, and the completion of which would necessarily result in the registration of the land purchased under the Local Registration of Title Act, and as the registration would have the effect, by virtue of sect. 84, of making the land devolve as personal estate, it would also by a process of relation back have the effect of altering the devolution of the estate on the death of the purchasing tenant, although the death occurred at a date prior to the act of registration. Let us see, then, whether there is anything in the Local Registration of Title Act which justifies this theory of relation back. By sect. 22 the registration of the ownership of freehold land is made compulsory where the land has been sold and conveyed to or vested in a purchaser under the Land Purchase Acts; and by sect. 84 freehold registered land vested in any person is made to devolve to his personal representative. I cannot find anything in this section to warrant the assertion that freehold land must devolve upon the personal representatives of a person who was never the owner of registered land. If a tenant who had agreed to purchase his holding died before registration, he was never the owner of freehold registered land; he was never within the section; and the devolution of his estate could not have been touched by sect. 84. I cannot see how a section which expressly deals with the devolution of registered land can affect the devolution of land which was unregistered at the time the devolution took place. Devolution cannot be held in suspense. It must take place immediately on the happening of the event which determines the previously existing ownership. Further, when the time for registration has come, the person entitled to be registered must be ascertained by the events which

have happened before registration, and not by the registration itself.

The learned counsel who appeared in support of the next-of-kin based his argument principally on the doctrine of conversion, and he said very truly that conversion in this case must relate back to the agreement to purchase, which was an absolute and not a conditional contract; but the conversion worked by the contract was a conversion from a quasi freehold to a fee-simple. If he relies upon a conversion caused by the act of registration, I cannot see how or why that should have a retrospective effect. No doubt it was said that when the purchaser entered into the contract for purchase he knew, or must be taken to have known, that registration was a necessary consequence, involving a change in devolution; but there is nothing in the Act to suggest that the devolution should be changed before registration. This depends on the construction of sect. 84. I can find nothing in that section which gives it a retrospective character. Further, it seems to me that the argument for the next-of-kin was based on the false assumption that registration of a freehold estate involves conversion. What is conversion? It is a transformation of one kind of estate known to the law into another kind of estate, that is, a chattel estate becomes a freehold, or a freehold a chattel. Now I challenge the proposition that registration changes a freehold into a chattel interest. It merely alters the devolution, but it does not alter the estate. A close reading of the Act shows that this is so. Sect. 84 says that registered land on death shall devolve to the personal representative "as if it were a chattel real." I conclude from this that the freehold estate was to remain, but to devolve in a particular manner. The devolution of a freehold on personal representatives makes it none the less freehold. If this were not so, trust estates in fee, which under the Conveyancing Acts devolve upon the personal representatives of the surviving trustee, would cease to be held in fee. Similar observations may be made on sect. 85, which abolishes tenancy by the courtesy and dower. But the abolition of these attributes of real estate does not destroy the real estate. The right to dower was already cut down by statute, but that did not in the least deprive fee-simple estates of their former character.

If it is necessary to further refer to the Act to show that it was not the intention to convert freeholds into chattels real by the act of registration, I refer to sect. 86, sub-s. 3, which directs registered land to be administered "as if it were personal estate," but provides that nothing therein contained shall alter or affect "the order in which real and personal assets respectively are now applicable in or towards the payment of funeral or testamentary expenses, debts, or legacies." This makes it clear that, although the devolution was to be changed, the estate was to remain as it was. The statute therefore works no conversion. It merely alters the devolution; and when the doctrine of relation back is spoken of it can only refer to devolution, and the question resolves itself into this: Is the devolution to be changed at a

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time previous to the registration which altered the devolution? This is easily answered by reference to sect. 84, which only says that such land, i.e. freehold registered land, is on death to devolve, &c.; but says nothing of the devolution of land unregistered at death.

For these reasons I entertain the personal opinion that the claim of the heir in this case should prevail; but I am confronted with the decision in *M'Donnell* v. *Stenson* (1), with which I will now deal. This case came before Mr. Justice Powell, and the question at issue was whether the heir-at-law or the personal representative of one Barbara M'Donnell, deceased, had become entitled to lands. The facts were shortly these. The deceased had held the lands under a lease for three lives or a term of ninety-nine years, whichever should last the longest, with a covenant by the landlord that on the death of each life during the term he would nominate another life in place of the life so dying. At the death of Barbara M'Donnell the lives had all dropped, but the term of years was still current. The lease had not been renewed, and there was a question whether the right of renewal was gone. Barbara M'Donnell had entered into an agreement to purchase under the Land Purchase Acts, and the necessary advance by the Land Commission was sanctioned during her lifetime. The agreement had therefore become absolute, and the case was one in which registration would be compulsory under the Local Registration of Title Act. Barbara M'Donnell died before the lands were vested in her by the Land Commission. In Mr. Justice Powell's Court the sole question argued was whether the right of renewal was lost, the case proceeding on the assumption that if the right of renewal remained the lands devolved on the heir-at-law, and if lost on the personal representative. Mr. Justice Powell decided in favour of the heir-at-law. An appeal was then taken by the personal representative, and from the report of the case it is plain that the main argument there was over the right of renewal, and that the effect of the Local Registration of Title Act occupied only a comparatively small share of the attention of the opposing counsel and, as a consequence, of the Court.

On the main question there was a division of opinion between Ronan and O'Connor L.JJ., while Campbell C. gave no opinion, as he thought it unnecessary to do so. The decision turned on the effect of the Local Registration of Title Act, 1891, about which the Court was unanimous in the decision that it made the land personal estate of Barbara M'Donnell. The Lord Chancellor disposed of this question by simply saying that the Act provided that the devolution in such a case is to be as if the property were personal estate, and therefore upon her death all her estate and interest passed to the personal representative. Ronan L.J. directed his observations to establishing the proposition that there was an absolute contract to purchase in the life of the deceased, and an absolute statutory duty on the Land Commission to register the land. For that reason he agreed with the Lord

(1) [1920] 1 I. R. 85; [1921] 1 I. R. 80.

Chancellor. O'Connor L.J., having taken the view that the right of renewal was gone, thought it unnecessary to decide the question arising under the Local Registration of Title Act, but held that, on the principle that equity considers that as done which ought to be done, the deceased was at her death the equitable owner in fee of the lands, the fee being by statute descendible as personalty.

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I am absolutely bound by this decision; but I feel bound to say that in my opinion it is not satisfactory. The question does not seem to have been fully argued. It was not dealt with as the main question before the Court. There does not appear to have been any critical examination of the statute. It seems to have been taken for granted on all sides that the conversion effected by the agreement of unregistered land gave a retrospective character to sect. 84, which in terms only alters the devolution when the lands had been in fact registered.

As I said before, although I humbly hold an opposite opinion, I am bound by the decision of the Court of Appeal, and I must hold that the next-of-kin of Patrick Collins are entitled to his estate in the lands.

R. R.

Appeal. 1924.

Mar. 4, 6.

The heir-at-law, one of the defendants, appealed (1).

Conner K.C. and *Kough*, for the appellant:—

This case is distinguishable from *M'Donnell* v. *Stenson* (2). In that case the advance of the purchase-money had been sanctioned. In this case there is only an undertaking to purchase, no advance has been sanctioned, and it cannot be said that for the purpose of devolution the lands are registered lands.

[*Price K.C.*: Once an agreement to purchase an estate is made between the landlord and the Land Commission the latter is bound to carry out the transaction in its entirety: *In the Matter of the Estate of George L. Tottenham* (3).]

No conversion has yet taken place in this case. [They referred to: Local Registration of Title (Ireland) Act, 1891, sects. 22 and 84; *Re Mary Smith* (4); *O'Leary* v. *O'Dea* (5).]

Price K.C. and *W. Shannon*, for the respondent, were not called upon.

The Court held that the case was governed by *M'Donnell* v. *Stenson* (2), and affirmed the judgment of the Master of the Rolls with costs.

Solicitors for the appellant: *Hamilton & Craig.*

Solicitor for the respondent: *H. Concannon.*

Solicitor for personal representative of Patrick Collins: *P. M. Hosty.*

C. L.

(1) In the Court of Appeal, before MOLONY C.J., and RONAN and O'CONNOR L.JJ.

(2) [1921] 1 I. R. 80.
(3) 39 I. L. T. R. 264.
(4) 33 I. L. T. R. 69.
(5) [1921] 1 I. R. 8.

Appeal.
(I. F. S.)
1924.

LORD CLONCURRY *v.* LAFFAN AND OTHERS (1).
(1923. No. 256.)

Jan. 21.
March 14.

Vendor and purchaser—Contract—Verbal agreement—Specific performance —Memorandum in writing—Signature of agent lawfully authorised— Statute of Frauds (7 Wm. 3 (Ir.), c. 12), sect. 2.

B., the plaintiff's agent, agreed verbally with R. to sell to R. certain freehold lands for the sum of £10,000. No formal agreement was entered into, but R. entrusted to his solicitor M. the carrying out of the contract. On the day this agreement was made the vendor's solicitor wrote to the purchaser's solicitor: "B. informs us that he has agreed with R. for the sale to him of his holding . . . in fee-simple for the sum of £10,000. Under these circumstances we think it would be possible to reasonably limit the title." On the next day the purchaser's solicitor, in acknowledging the letter, stated: "The simple agreement arrived at herein appears in the first part of your letter, and I suggest that we can dispense with any further agreement."

Held, affirming the judgment of the Master of the Rolls ([1923] 1 I.R. 127), Ronan L.J. dissenting, that the writing of this letter was within the general scope of the authority conferred on M., and that it constituted a note or memorandum signed by R.'s agent, lawfully authorised, sufficient to satisfy the Statute of Frauds, although M. had not been specifically authorised to sign such a memorandum, and in writing the letter had no intention to sign one.

Per O'Connor L.J.: If in pursuance of the authority entrusted to him a solicitor has to sign something which if signed by his client would be a note or memorandum within the Statute of Frauds, the client is as much bound by the solicitor's signature as if it were his own.

APPEAL from an order of O'Connor M.R., dated July 31st, 1923. The action was brought for the specific performance of a contract for the sale of real estate. The plaintiff, Lord Cloncurry, was owner in fee of certain lands of Farnane and Ahacore, situate in the County of Limerick. Through his agent, Mr. Barrington, a verbal agreement was entered into with Mr. Patrick Ryan for the sale to him of the lands for £10,000. The contract was made at an interview in January, 1921, at which Mr. Barrington, Mr. Patrick Ryan, and his solicitor, Mr. O'Brien Moran, were present. From the evidence given by Mr. Barrington as to what took place at the interview, it appeared that Patrick Ryan was to buy the two farms, free from all interests and charges, for £10,000. He told Mr. Moran that Messrs. White & White were Lord Cloncurry's solicitors, and "I wrote to confirm what was done." Ryan said that the executors of his uncle's will objected to his selling the farms. In cross-examination the witness stated that Patrick Ryan had several farms of his own, and that his idea in buying the two holdings in question was for the purpose of handing over portion of the lands to certain landless men. He was quite certain that there was a concluded contract by word of mouth with Patrick Ryan on January 19th, 1921. Asked if that was so, why did he write the letter of the same day to Mr. Moran, the witness replied: "That there should

(1) Before MOLONY C.J., and RONAN and O'CONNOR L.JJ.

be no misunderstanding as to what we did." Then this question was put: "The offer had been accepted by the principal; why should his solicitor make an offer?" Mr. Barrington's answer was: "I thought it quite the fitting thing to write to the solicitor to confirm what we had done."

The remainder of the facts and the material correspondence are given in [1923] 1 I.R. 127.

H. Wilson K.C. and *A. Meredith K.C.* (with them *Bartley*), for the appellant:—

A solicitor must have specific, as distinct from general, authority to sign a memorandum binding upon his client: *Thirkell* v. *Cambi* (1). In *North* v. *Loomes* (2) there were in existence written terms of the contract which the defendant instructed his solicitor to carry out; and Younger J. observes: "It was an essential implication that he should, if and when necessary, affirm on behalf of his client the existence and validity on his side of the contract he was instructed to carry out." In this case there was only a verbal agreement; and prior to Mr. Moran's letter, relied upon by the plaintiff as a sufficient memorandum, there was no binding contract: in fact, there was no contract at all.

Mr. Moran was not a person lawfully authorised by Patrick Ryan to sign a memorandum of the contract. The onus of proving authority rests upon the person relying upon the contract. In *Ridgway* v. *Wharton* (3) Lord Wensleydale says: "Now this proposition, which is an affirmative proposition . . . is a proposition to be distinctly made out by the plaintiff. He must satisfy the Court, not so as not to admit of a reasonable doubt, but upon the balance of the evidence that Crawter was the defendant's agent. He must prove that as a matter of fact, and if he leaves that question at the end of the case, in even scales, the plaintiff cannot prevail."

[Other authorities cited: *Smith* v. *Webster* (4); *The Earl of Glengal* v. *Barnard* (5); *Bowen* v. *Duc D'Orleans* (6).]

Leonard K.C., Overend K.C. (with them *Macrory*), for the respondent:—

Authority to make a memorandum and authority to enter into a contract are two different things. The contract the plaintiff is seeking to enforce is Patrick Ryan's contract. If the letter of January 22nd had been signed by Patrick Ryan it would have been a sufficient compliance with the Statute of Frauds. We do not argue that Mr. Moran had authority to make a contract, but we submit that he had authority to write the letter in question, and that this letter is a note or memorandum sufficient to satisfy the Statute of Frauds. "The unintentional by-product

(1) [1919] 2 K.B. 590, at p. 595.
(2) [1919] 1 Ch. 378.
(3) 6 H.L.C. 238, at p. 296.
(4) 3 Ch. D. 49.
(5) 1 Keen, 769.
(6) 16 T.L.R. 226.

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of satisfying the Statute of Frauds may be produced as completely by a note or memorandum signed by an agent of the party as by a note or memorandum signed by the party himself, provided, of course, that the agent had authority to sign the particular note or memorandum'': per Sargent J. in *Daniels* v. *Trefusis* (1). We rely upon *John Griffiths Cycle Corporation, Ltd.*, v. *Humber & Co., Ltd.* (2); *Daniels* v. *Trefusis* (1); and *North* v. *Loomes* (3). In each of these cases, as was pointed out by Bankes L.J. in *Thirkell* v. *Cambi* (4), the Court came to the conclusion that the person who put his name to the memorandum had authority to do what he did, even though it might have an effect which was not anticipated.

[They also referred to: *Grindell* v. *Bass* (5); *Horner* v. *Walker* (6); *Koenigsblatt* v. *Sweet* (7); *Jones* v. *The Victoria Graving Dock Co.* (8).]

Wilson K.C., in reply:—

In *Daniels* v. *Trefusis* (1) the solicitor had express authority from his client to make admissions.

MOLONY C.J.:—

This is an appeal from an order of the Master of the Rolls, dated the 31st July, 1923, decreeing specific performance of an agreement made verbally on or about the 10th January, 1921, between Patrick Ryan, since deceased, and John B. Barrington, as agent for the plaintiff, for the sale to the said Patrick Ryan for the sum of £10,000 of the lands of Farnane and Ahacore, in the County of Limerick, in fee-simple. Since the date of the alleged agreement Patrick Ryan has died, and the defendant, Johanna Laffan, is sued as administratrix of the said Patrick Ryan; and the defendants, Mary Agnes Ryan and John Martin O'Connor, are sued as co-heirs-at-law of the said Patrick Ryan, deceased. It appears that Lord Cloncurry authorised the said John B. Barrington to enter into a contract for the sale of the said lands for £10,000, and accordingly Mr. Barrington had an interview with Patrick Ryan, and it was agreed to purchase the said lands. Mr. O'Brien Moran was the solicitor for Ryan acting in the matter, and he attended the meeting at which the sale was agreed on. Mr. Barrington instructed Messrs. White & White to act for Lord Cloncurry, and they accordingly wrote to Mr. O'Brien Moran on the 21st January, 1921, a letter in which they stated that Mr. J. B. Barrington, Lord Cloncurry's agent, had informed them that he had agreed with Mr. Ryan for the sale to him of his holding of Farnane and Ahacore in fee-simple, free from all superior interests, for the sum of £10,000, and made certain suggestions in reference to shortening the abstract of

(1) [1914] 1 Ch. 788, at p. 799.
(2) [1899] 2 Q. B. 414.
(3) [1919] 1 Ch. 378.
(4) [1919] 2 K. B. 590, at p. 595.
(5) [1920] 2 Ch. 487.
(6) [1923] 2 Ch. 218.
(7) [1923] 2 Ch. 314.
(8) 2 Q. B. D. 314.

title, and offering to prepare an agreement on the lines indicated. To this letter Mr. O'Brien Moran replied on the following day, stating: "The simple agreement arrived at herein appears in the first part of your letter, and I suggest that we can dispense with any further agreement, as, so far as I am concerned, if you furnish me with your abstract of title showing a fee-simple title free from all superior interests, provided I am satisfied with same, I will not insist on any requisitions, which can be dispensed with, and which would entail an unnecessarily exhaustive title." This letter from Mr. O'Brien Moran is relied upon by the plaintiff as a compliance with the Statute of Frauds.

The statute requires that the agreement or "a memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised." In the present case there was no agreement signed by Ryan; and it lies upon the plaintiff to show that, in the circumstances, Mr. O'Brien Moran was authorised to sign a memorandum or note of the contract. It is clear that a solicitor who is instructed to prepare a formal agreement between parties is not an agent lawfully authorised to sign a memorandum under the Statute of Frauds: *Smith* v. *Webster* (1); but the case may be different where a solicitor is entrusted with the carrying out and completion of a contract for the purchase of land.

In this case the Master of the Rolls has found as a fact that Patrick Ryan, as purchaser, committed the matter for completion to Mr. O'Brien Moran, and gave him a general authority to do all that was necessary for getting a good title to the lands and having them conveyed to him. In my opinion the evidence supports his finding; and the question consequently resolves itself into this: whether Mr. O'Brien Moran, having been instructed to carry out and complete the sale, was in a position to bind Ryan by executing a memorandum setting out the terms of the agreement? It is quite true that Mr. O'Brien Moran, in writing the letter, had no intention of executing a memorandum within the Statute of Frauds; but I agree with the observations of the Master of the Rolls where he said (2): "Now, the important part of this letter is the statement, 'the simple agreement arrived at herein appears in the first part of your letter.' This is as plain an acknowledgment as could well be made of the contract. That is not denied. The only point made is that Mr. O'Brien Moran was not lawfully authorised to make it. This is the question for decision. In my opinion the writing of the letter and every part of it, and the placing of his signature to it, came within the general scope of the authority conferred by Mr. Patrick Ryan on Mr. O'Brien Moran. He had entrusted to him as a solicitor the carrying out of the contract for the purchase of land. That involved an authority to do everything that was necessary and proper for the protection of his interests;

(1) 3 Ch. D. 49.

(2) [1923] 1 I. R. 127.

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and when Messrs. White & White suggested that a limitation should be put on the investigation of the title, it was right for Mr. O'Brien Moran to state the contract under which his client was buying: that that contract was an open contract, and that he was not bound to submit to any special limitation being put on the investigation of the title. This was, in substance, his letter. It is for this reason I say that he was lawfully authorised by his client to make the statement of the contract and to sign it, and that the letter is a memorandum sufficient to satisfy the Statute of Frauds."

I do not propose to go through the cases, most of which are dealt with by the Master of the Rolls. In the case of *Jones* v. *The Victoria Graving Dock Co.* (1) it was held that the signature of the chairman affixed to a minute book, for the purpose of verifying the accuracy of the entry therein contained, operated as an admission of a contract referred to in the minutes, and was sufficient to satisfy the Statute of Frauds (7 Wm. 3 (Ir.), c. 12), sect. 2, although it was quite clear that the chairman had no such intention. In *John Griffiths Cycle Corporation, Ltd.*, v. *Humber & Company, Ltd.* (2), the Court of Appeal in England (A. L. Smith L.J., Rigby L.J., and Vaughan-Williams L.J.) approved of and adopted *Jones* v. *The Victoria Graving Dock Co.* (1) case. A. L. Smith L.J., in delivering the judgment of the Court, said (p. 417): "It is undoubted law that the party to the contract himself may, by signing a document subsequent to that containing the terms of the contract, recognise the contract in the way required by sect. 4 of the Statute of Frauds. It is also undoubted law that a signature to a document which contains the terms of a contract is available for the purpose of satisfying sect. 4 of the statute, though put alio intuitu and not in order to attest or verify the contract: *Jones* v. *The Victoria Graving Dock Co.* (1)."

The same principle was laid down by Sargent J. in *Daniels* v. *Trefusis* (3), and by Younger J. in *North* v. *Loomes* (4); and both these cases were cited with approval by Bankes L.J. in the Court of Appeal in the case of *Thirkell* v. *Cambi* (5). It would indeed be difficult to get a case nearer to the present than *North* v. *Loomes* (4). In that case there was a verbal agreement that North should sell to Loomes certain premises for £590, and Loomes paid North £50 as a deposit, for which North gave a receipt setting out that the money was received as a deposit on the purchase price of £590 for the house and premises in question, and that the balance of the purchase price was to be paid on or before the 25th of March following. Loomes sent the receipt to his solicitor, instructing him to carry out the agreement; and North's solicitor sent to Loomes' solicitor a draft contract for perusal and approval, whereupon Loomes' solicitor wrote back:

(1) 2 Q. B. D. 314.
(2) [1899] 2 Q. B. 414.
(3) [1914] 1 Ch. 788.
(4) [1919] 1 Ch. 378.
(5) [1919] 2 K. B. 590.

"I need not trouble you to send me another contract, as the one which your client has signed is, I think, quite sufficient."

Similarly in the present case there was an oral contract. The vendor, through his agent, instructs his solicitor to carry out the contract on his behalf, and the purchaser leaves the matter of the completion of the purchase to his solicitor, who was present at the time the oral contract was made. The vendor's solicitors suggest an agreement limiting the title, and the purchaser's solicitor writes back in the terms already referred to. In these circumstances every word of the judgment of Younger J. as regards the Statute of Frauds is applicable to the present case. Younger J., after referring to the contract, says (p. 382): "Is there of that contract a sufficient memorandum signed by the defendant or by the agent of the defendant thereunto lawfully authorised? I think there is, and it is contained in Mr. Taylor's letter of February the 8th. It is not denied that that letter would have been a sufficient memorandum had it been signed by the defendant himself. It is said, however, that Mr. Taylor had no authority to sign such a letter so as in effect to conclude a binding contract between the defendant and the plaintiff; and *Smith* v. *Webster* (1) is relied on in support of that contention. But in my opinion that case is easily distinguishable. Mr. Taylor's instructions here were to carry out the contract which his client told him he had already made, and on which he had paid £50 as a deposit. Mr. Taylor had, in fact, the authority which Malins V.-C., in *Smith* v. *Webster* (1), believed that the solicitor there possessed, and it was because the Court of Appeal found that the solicitor possessed no such authority that they disagreed with the judgment of the Vice-Chancellor. 'He goes to his solicitor,' says James L.J. in that case, 'and the only authority he gives his solicitor is to prepare a formal document; he gives him no authority to do anything more.' And as Sargent J., in *Daniels* v. *Trefusis* (2), commenting on *Smith* v. *Webster* (1), says, that case 'really decided that the authority of a solicitor to prepare a draft contract did not include, and indeed was inconsistent with, an authority to state in a binding form, and so as to constitute a contract, the rough heads of information which had been given by the client to the solicitor as material by which to draw a formal contract.' Very different, however, as I have said, is the case here. Mr. Taylor's instructions from the defendant were to complete, not to negotiate, a contract. It was an essential implication that he should, if and when necessary, affirm on behalf of his client the existence and validity on his side of the contract he was so instructed to carry out. His authority to write the letter of February the 8th was therefore, in my opinion, complete, and this defence of the statute fails."

I approve of and adopt the words of Younger J.; and I hold in the present case that Mr. O'Brien Moran was instructed to

(1) 3 Ch. D. 49-57. (2) [1914] 1 Ch. 788-798.

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complete, and not merely to negotiate, the contract; that being so instructed to act, he could legally affirm on behalf of his client the existence and validity on his side of the contract he was so instructed to carry out; that his signature to the letter which contains the terms of the contract satisfies sect. 2 of the Statute of Frauds (Ir.), although put alio intuitu and not in order to attest or verify the contract.

The judgment of the Master of the Rolls was, in my opinion, right, and the appeal will be dismissed with costs.

O'CONNOR L.J. :—

It is sometimes said that an agent—in the absence of express authority to do so—has no power to bind his principal by signing a note or memorandum of a verbal contract already entered into by his principal. The proposition thus stated is, in my opinion, too wide. There is no doubt but that the signature by such an agent of a note or memorandum affixed merely for the sake of constituting such a note or memorandum will not bind the principal. The reason, of course, is obvious—namely, that the agent has no express authority to sign such note or memorandum for the mere purpose of binding his principal, nor is it within the scope of his implied authority to do so. But it may be that the agent has implied authority to sign something, which, if signed by the principal, would be a note or memorandum within the Statute of Frauds—to sign it, not for the purpose of binding his principal (which is not within the scope of the agent's authority) but for other purposes which are within the scope of the agent's authority. Such a case may—and I think frequently does—arise where a solicitor is employed in reference to a contract for sale or purchase of land. The solicitor has no authority, for the sake of binding his principal, to sign a note or memorandum of the contract. But if, in the course of the transaction for which he is employed and in pursuance of the authority entrusted to him, the solicitor has to sign something which, if signed by the client, would be a note or memorandum within the Statute of Frauds, then the client is as much bound by the solicitor's signature as if it were his own. An example of that would be where a controversy arises as to the terms of the contract; the solicitor carrying on the correspondence on behalf of his client would or might not only be entitled, but bound to state the terms of the contract correctly. If he does so, I fail to see upon what principle his client is not bound by a transaction which he has himself, impliedly of course, authorised.

In cases of this sort the question resolves itself into this—was it within the scope of the solicitor's authority to write and sign what he did write and sign? As I believe that the statement of the contract relied upon in this case was within the solicitor's authority, I hold that the decision of the Master of the Rolls was right and that this appeal should be dismissed.

Of course this does not mean that if a solicitor unnecessarily interjects into a correspondence a statement of the contract and signs it that that would bind his principal. It would not; for such statement would not be within the solicitor's authority at all; for it would not be a necessary and ordinary incident of the correspondence.

RONAN L.J.* :—

In this case I have come to a conclusion different from that of three other Judges. Were it not for their opinion I should not have had the least doubt about this case. In his judgment, Lord Justice O'Connor takes my view of the facts. My view of the evidence is, first, that there was no express authority to the solicitor; Lord Justice O'Connor takes the same view. Secondly, it is not within the general authority of a solicitor to sign a contract or a memorandum of a contract on the part of his client. The sole point upon which the Lord Justice decides in favour of the plaintiff in this case is that the solicitor was, so to speak, placed in a position where it was necessary for him to sign a memorandum of the contract. It is a well-known principle that a person may become what the law calls an agent of necessity. In that case the law would give a solicitor authority to sign as an agent of necessity.

The Lord Chief Justice has read portion of the judgment of the Master of the Rolls and cited *Jones* v. *The Victoria Graving Dock Co.* (1) and *John Griffiths Cycle Corporation, Ltd.*, v. *Humber & Co., Ltd.* (2), in reference to the object with which the parties sign the contract; but if there is one thing clear from the judgments in these cases it is that the object or motive with which the parties sign is immaterial, and that there are only two questions to be considered—namely, is there a memorandum? and was the solicitor an agent lawfully authorised to sign the memorandum under the Statute? In a case like this involving the sale of land for £10,000 where the vendor has signed the contract and the purchaser has not signed, the purchaser has not assumed any obligation and he is not bound, unless he so wishes, to pay the £10,000. The Statute provides that no action shall be brought against him unless the agreement or "some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised."

In Sugden's Law of Vendors and Purchasers, 14th edition, it is stated, at p. 146, that: "The Statute requires every agreement as to lands, or some memorandum or note thereof, to be in writing and signed by the party to be charged, or some other person thereunto (that is to the signing thereof) by him authorised," and the author quotes as an authority for that

* This judgment has not been revised by Ronan L.J.

(1) 2 Q. B. D. 314.

(2) [1899] 2 Q.B. 414.

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proposition: *Howard* v. *Braithwaite* (1), where Lord Eldon says: "No man shall be bound by an agreement concerning land unless the agreement is to be found in some writing signed by himself, 'the party to be charged therewith'; or by some agent 'thereunto,' that is, as I understand it, to the signing thereof, lawfully authorised by such party." Therefore, it is quite clear that, in a case like the present, the purchaser is under no obligation to pay the purchase money. The Lord Chief Justice referred to *Thirkell* v. *Cambi* (2), the latest case on the subject. In that case Eve J., who was one of the Judges in the Court of Appeal, delivered an able exposition of the law. He says: "Mr. Bevan relied on the letter of Mr. Carr, dated January 2nd, as constituting a sufficient memorandum. He relied, therefore, on a memorandum made and signed by an agent. In such a case I take it to be the law that the person who signs as an agent must be authorised to sign a memorandum of a contract of the nature of that on which the plaintiff relies, and that it is for the plaintiff to prove that the signatory was an agent so authorised." In support of this view he read a short passage from the judgment of Lord Wensleydale in *Ridgway* v. *Wharton* (3), and proceeded: "This being an action founded upon a memorandum signed by an agent, the plaintiff cannot succeed unless he has affirmatively proved that the agent was authorised to sign a memorandum of the particular contract on which the plaintiff claims. In my opinion this action fails, because the appellant did not prove that Mr. Carr was the agent authorised to sign on the respondent's behalf a memorandum of the contract on which the appellant claimed." In this case what does "authorise a party to sign a memorandum of the contract" involve? It involves power to impose upon the purchaser an obligation to pay £10,000. Apart from the general authority of a solicitor, with which I shall deal later, how could any Court be satisfied beyond reasonable doubt that the defendant here authorised Moran to bind him to pay £10,000? In the course of the case where do we find any evidence that the defendant authorised Moran to sign a memorandum of the agreement binding him to pay £10,000? In numerous cases the terms of contracts were stated in the correspondence between solicitors, but in none of these cases has it been held that the party was bound.

The Master of the Rolls said in the Court below: "In consequence of the assertion made by Mr. Wilson that there is no instance in the books of a memorandum being held sufficient by reason of a general authority, I wish to go back for a moment to the judgment of Sargent J. It will be remembered that I quoted part of his judgment in which he said: 'Here the authority was not a general authority at all, but an authority to forward to the plaintiff's advisers certain

(1) 1 Ves. & Be. 202, at p. 207. (2) [1919] 2 K.B. 590.
(3) 6 H. L. C. 238, 296.

particular documents.' At first blush that would seem to mean that a general authority would not be sufficient, but that, in my opinion, was not his meaning. He only meant that there was even more than a general authority—a particular authority—which strengthens the position. If he meant anything else he would stand alone in his opinion." Mr. Wilson repeated before us the assertion referred to; and we have heard of no cases in which a party was held bound by the signature of a solicitor except *North* v. *Loomes* (1) and *Daniels* v. *Trefusis* (2); but both these cases were decided on the ground that the solicitor in each was authorised in writing by his client to sign the memorandum.

In *North* v. *Loomes* (1) Younger J. says: "Mr. Taylor's instructions from the defendant were to complete, not to negotiate a contract." Therefore that case decides that as a fact there was express written authority to sign a memorandum of the contract. Both the Lord Chief Justice and the Master of the Rolls say that *North* v. *Loomes* (1) is very similar to the present case. What were the facts in that case? Younger J. found that the letter sent by the defendant to Mr. Taylor, his solicitor, amounted to instructions to carry out the contract, which the client had already made, and that the solicitor's authority, to affirm on behalf of his client the existence and validity on his side of the contract he was so instructed to carry out, was complete. The case depended entirely upon the letter from the defendant to his solicitor, which letter the Judge construed as an express authority to sign the memorandum. The Lord Chief Justice and the Master of the Rolls would be right in this case if the evidence showed that the purchaser had authorised Mr. Moran to sign a memorandum on his behalf. *North* v. *Loomes* (1) is no authority in favour of the plaintiff here; it is like the present case, with the part of Hamlet left out. Authority to conduct correspondence qua solicitor with another solicitor is quite different from authority to sign a memorandum of a contract.

I fail to see how *Daniels* v. *Trefusis* (2) can be regarded as an authority in support of the plaintiff's case. Counsel for the defendant in that case argued that "if a principal writes a letter containing materials enough to show a contract within the statute, it is immaterial what his intention was in writing the letter. But in the case of an agent it is different; in that case the other party must show—and the onus lies on him to do it—that the agent was authorised to sign the note or memorandum of a contract as such. The real test is whether, where a solicitor is not expressly authorised to sign any document recognising the proposed terms, it is within the scope of his authority to sign. No such authority was given in the present case." Dealing with that argument, Sargent J. says: "But here the authority was not a general authority at all, but an authority to forward to the

(1) [1919] 1 Ch. 378, at p. 383. (2) [1914] 1 Ch. 788.

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plaintiff's advisers certain particular documents." I cannot understand the statement of the Master of the Rolls to the effect that Sargent J. meant that there was "even more than a general authority." I fail to see what bearing those two cases have on the present case.

This is the first case in which it has ever been held that a purchaser was bound by a letter from one solicitor to another in regard to negotiations in progress. What foundation is there in fact for the allegation that any authority was given by the purchaser in this case to sign the memorandum? There is no evidence of any authority in writing. Therefore, if authority was given, it must have been given verbally by the defendant to his solicitor. The only evidence of any meeting between Mr. Moran and the defendant is that relating to the interview when the contract was made. We have before us the official shorthand notes of the evidence, which describes what took place at that interview. The first witness was Lord Cloncurry. Then Mr. Barrington, the agent, was examined; and it is entirely on his evidence that the express authority to Mr. Moran is asserted to be proved. The account given by the Master of the Rolls of that interview is as follows: "On that occasion a contract was entered into between Mr. Barrington, acting for Lord Cloncurry, and Mr. Patrick Ryan, in the presence of Mr. O'Brien Moran, his solicitor, for the sale of the lands. As soon as the agreement was made, Mr. Barrington, in the presence of Mr. Patrick Ryan, told Mr. O'Brien Moran that Messrs. White & White, of Dublin, were Lord Cloncurry's solicitors, and that they would carry out the matter for him." The answer to that statement is that Mr. Barrington did not say what is attributed to him. The Master of the Rolls adds: "I find as a fact from the evidence that on that occasion Mr. Patrick Ryan, as purchaser, committed the matter for completion to Mr. O'Brien Moran, and gave him a general authority to do all that was necessary for getting a good title to the lands and having them conveyed to him." What did Mr. Barrington say? He says: "I told Mr. Moran that Messrs. White & White were Lord Cloncurry's solicitors." The words, that "they would carry out the matter for him," are not in his evidence. There is no evidence that Ryan gave any authority to Mr. Moran to sign a memorandum on his behalf. The true position is admirably described by O'Connor L.J. in the following words: "The agent has no express authority to sign such note or memorandum for the mere purpose of binding his principal, nor is it within the scope of his implied authority to do so. But it may be that the agent has implied authority to sign something which, if signed by the principal, would be a note or memorandum within the Statute of Frauds—to sign it, not for the purpose of binding his principal (which is not within the scope of the agent's authority), but for the purposes which are within the scope of the agent's authority. Such a case may—and I think frequently does—arise where a solicitor is employed

in reference to a contract for sale or purchase of land." There is no doubt that Mr. Moran was employed in reference to the sale or purchase of land. But it would have been wholly unnecessary for Younger J., in *North* v. *Loomes* (1), to have referred to a letter giving express authority if the fact of employment as solicitor gave the authority. Here Mr. Moran was employed simply as solicitor; and there is not a scrap of evidence in the case showing that he was given any authority to sign a memorandum of the contract. The case for the plaintiff reduces itself to this: that where a solicitor is employed to act for a purchaser he is given power to sign a memorandum of the contract. No authority for this proposition can be found in the books.

In the case of *Bowen* v. *Duc d'Orleans* (2) Romer L.J. lays down the law thus: "But assuming that there was a concluded contract, in order to get a memorandum in writing of it to satisfy the Statute of Frauds the plaintiff must rely upon Messrs. Farrer & Co.'s signature on April 1st. But Messrs. Farrer & Co. were only employed as solicitors, and it was no part of their duty to sign a contract for the purchaser." In this case Mr. Moran was only employed as solicitor for the purchaser. The case of *Bowen* v. *Duc d'Orleans* (2) is cited in Halsbury and in Fry on Specific Performance, and has never been questioned.

The statute distinguishes between an agent who is authorised to sign a memorandum of the contract and an agent who is not so authorised. O'Connor L.J. thinks that the mere fact that a solicitor is employed gives him contingent authority, in case it should become necessary, to sign a memorandum of the contract; and that if in the course of the transaction he signs something which, if signed by the client, would be a good memorandum within the meaning of the statute, then the client is bound. This question of agency of necessity is a very peculiar doctrine of law. It applies mainly to captains of ships. The captain of a ship has implied authority to pledge his principal's credit at home or abroad for fit and proper repairs and stores for the equipment of the vessel on her voyage; he may borrow money on his principal's credit at home or abroad, if the advance is necessary for the prosecution of the voyage, and if communication with the principal is not practicable; but to render the principals liable for such an advance the lender must prove that there was a reasonable necessity, according to the ordinary course of prudent conduct to borrow on their credit. There is no implied authority to pledge the credit of the principals when communication with them can reasonably be had. The idea that a solicitor may on this principle render his client liable for £10,000, when the client lives quite close to him, is absurd. The doctrine of agency of necessity has no application in this case.

For these reasons I am of opinion that the judgment of the Master of the Rolls ought to be reversed.

Solicitor for the appellant: *Thomas O'Brien Kelly.*
Solicitors for the respondent: *White & White.*

C. L.

(1) [1919] 1 Ch. D. 378.
(2) 16 T. L. R. 226.

Appeal.
(N. I.)
1924.

April 28.
May 9.

NORTHERN BANKING COMPANY, LIMITED, *v.* BERNARD DEVLIN (1).

Owner of registered charge on lands—Action for recovery of land—Mortgagee against mortgagor—Mortgage by way of charge only—Supreme Court of Judicature Act (Ireland), 1877 (40 & 41 *Vict. c.* 57), *sect.* 27, *sub-s.* 1—*Local Registration of Title (Ireland) Act*, 1891 (54 & 55 *Vict. c.* 66), *sect.* 40, *sub-ss.* 2 *and* 4—*Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *sect.* 2, *sub-s.* 5; *sect.* 7, *sub-s.* 1 (*c*); *and sect.* 19.

The defendant D., the registered owner of certain lands, being indebted to a bank to secure moneys already advanced and further advances, executed a deed of charge, by which he covenanted to pay all moneys then or thereafter due, and interest thereon; and all moneys so covenanted to be paid were thereby declared well charged on the lands therein comprised. The deed of charge contained an assent by D. to the registration of the charge as a burden affecting the lands. It also provided that all the powers conferred upon mortgagees by the Conveyancing Act, 1881, should apply to the security, and that the powers of leasing conferred on a mortgagor in possession by the Conveyancing Act, 1881, should not be exercised without the consent in writing of the bank. The deed of charge was duly registered. D. made default in payment of principal and interest due under the deed, and the bank instituted an action for recovery of the land.

Held by the Court of Appeal, N.I. (Sir Denis Henry, Bart., C.J., and Andrews L.J.), on case stated by Moore L.J., that the bank were mere chargeants on the lands, who had not either the estate or the statutory power necessary to enable them to recover possession.

CASE STATED for the opinion of His Majesty's Court of Appeal in Northern Ireland by Moore L.J. from the County of Down Spring Assizes in March, 1924.

The case stated is as follows:—

This case came before me as Judge of Assize for the County of Down on March 1st, 1924, by way of appeal from a decree for possession granted by the County Court Judge of Down.

I refer to the original Civil Bill which was in ejectment.

It appeared, and I so found, that the defendant, Bernard Devlin, by deed of 11th October, 1922, as beneficial owner, charged the lands now sought to be recovered in favour of the bank. I refer to the deed in question and to the certificate of charge.

The lands were subject to the provisions of the Local Registration of Title Act, 1891, and were registered in the Local Registry.

The deed of charge was also registered.

It was admitted that Bernard Devlin was in default so far as payment of principal and interest due under the deed was concerned.

The County Court Judge gave a decree for possession, believing, as appears from a letter from his Registrar, that he was bound by a decision of Mr. Justice Wilson.

(1) In the Court of Appeal (N.I.), before SIR DENIS HENRY, Bart., C.J., and ANDREWS L.J.

I consulted Mr. Justice Wilson, who says that he never fully considered the matter and it was never argued before him. All he did was to direct the officer in the case of a writ of summons specially indorsed in ejectment which was undefended to enter judgment for possession in the office.

Mr. T. J. Campbell K.C., for the plaintiff, referred to *Antrim County Land, Building, and Investment Co.* v. *Stewart* (1), and relied on the combined effect of the Judicature Act (Ireland), 1877, sect. 27, the Conveyancing Act, 1881 (definition sect. and sect. 7, sub-s. 1 (*c*)), and the Local Registration of Title Act, 1891, and claimed that the plaintiffs were entitled to succeed.

Mr. Murphy K.C., contra.

I was of opinion that the plaintiffs had no estate of any sort entitling them to bring an action of ejectment; that they owned a charge on the lands, but not the lands themselves, and that their proper remedy was an order for sale in the Chancery Division.

At the request of plaintiffs' counsel, I agreed to state a case for the opinion of the Court.

The question is whether or not in the premises the plaintiffs are entitled to succeed in an action of ejectment.

T. J. Campbell K.C. and *Cromie*, for the plaintiffs, the Northern Banking Company, Limited:—

The Northern Bank had a right to obtain possession of the lands by the procedure adopted. Under the Local Registration of Title Act, 1891, the plaintiffs had an estate and interest in the lands sufficient to enable them to recover possession. The registration of the deed of charge was vital in the case, as by it they held the key to possession, not so much by the deed itself as by the registration of the deed. We rely strongly on sect. 40 of the Local Registration of Title (Ireland) Act, 1891. This Act gives us a greater power than is given by sect. 19 of the Conveyancing Act, 1881. A mortgagee by deed to enforce his power of sale could eject. A deed of charge in the form prescribed by the Act of 1891 operates as a conveyance by way of mortgage. The power of sale includes the power of possession as necessarily ancillary in order to make the power of sale operative. This is a statutory charge of a very far-reaching nature. Under sect. 41 of the Registration of Title Act, 1891, the transferee of lands under a registered charge can eject: *Antrim County Land, Building, and Investment Co.* v. *Stewart* (1). The Conveyancing Act, 1881, confers by sect. 7, sub-s. 1 (*c*), a right of entry on a mortgagee in default of payment of the principal money or interest secured by his deed. This power is extended by sect. 40 of the Registration of Title Act, 1891, and condition 4 of the deed of charge, to the registered owner of a charge.

(1) [1904] 2 I.R. 357.

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[They also referred to Registration of Title Act, 1891, sect. 35, sub-s. 1 and 2, and sect. 36; Conveyancing Act, 1881, sect. 2, sub-s. 5, and sect. 21; and to *National Bank* v. *Hegarty* (1); and *Everitt* v. *Automatic Weighing Machine Co.* (2).]

Murphy K.C. and *C. S. Campbell,* for the defendant:—

Moore L.J. was correct in his opinion that the plaintiffs had no estate of any sort entitling them to bring an action of ejectment. *National Bank* v. *Hegarty* (1) is a clear authority in our favour. *The Antrim County Land, Building, and Investment Co.* v. *Stewart* (3) is distinguishable. In that case Palles C.B. based his judgment on the existence of an equitable estate (see p. 364). The present case begins and ends with sect. 40 of the Registration of Title Act, 1891; this section gives at most an interest as distinguished from an estate in the land. The object of the Act was to make the register conclusive of the title to land, and every possible way of amending the register was provided for. It is necessary that a chargeant should come within sects. 40–43 of this Act.

Cur. adv. vult.

May 9.

ANDREWS L.J. delivered the judgment of the Court as follows:—

The short but important question for decision in this case is whether the owner of a duly registered charge on lands registered under the Local Registration of Title (Ireland) Act, 1891 (54 & 55 Vict. c. 66), can, on default of payment of principal and interest due under his deed of charge, maintain an action of ejectment on the title for the possession of the lands.

The matter comes before us on a case stated by Lord Justice Moore on the hearing of a civil bill at the recent Assizes at Downpatrick. The learned Lord Justice was himself of opinion that the plaintiffs had no estate of any sort entitling them to bring an action of ejectment; that they owned a charge on the lands, but not the lands themselves; and that their proper remedy was an order for sale in the Chancery Division.

The plaintiffs' charge follows the form customary in the case of charges in favour of banks: No. 23 in Appendix E. of Browning and Smith's work on Registration of Title in Ireland. Before considering its provisions, however, it may be helpful to bear in mind a few general but well-settled principles as to the rights of mortgagees and chargeants in regard to the recovery of possession of lands.

The mortgagee of the legal estate is, in the absence of express provision to the contrary, entitled to enter on the mortgaged premises at any time after the execution of the mortgage. A second mortgagee has, as our law at present stands, a similar right, when the first mortgagee is either prevented by express

(1) 1 N.I.J.R. 13. (2) [1892] 3 Ch. 506. (3) [1904] 2 I.R. 357.

provision in his deed from taking or does not wish to take possession. Such a right was enforced in this country in the case of *The Antrim County Land, Building, and Investment Co.* v. *Stewart* (1); and the judgment of Jessel M.R. in *General Finance, Mortgage, and Discount Co.* v. *Liberator Permanent Benefit Building Society* (2) shows clearly that in England also an action for ejectment cannot now be defeated for the want of the legal estate where the plaintiff has title to the possession.

In the case of actions by either first or second mortgagees it will be observed that there is a plaintiff who has an estate in the lands; and, in our opinion, the possession of such estate, legal or equitable, is necessary, in the absence of statutory provision to the contrary, to enable an incumbrancer to maintain his suit. A mere chargeant who has no estate in the lands cannot, without statutory authority, maintain an action of ejectment: see *National Bank* v. *Hegarty* (3). An illustration of the conferring of such statutory authority is to be found in sect. 25 of the English Land Transfer Act, 1875, upon which our Local Registration of Title Act, 1891, was in certain respects modelled, by which the registered proprietor of a registered charge is expressly empowered for the purpose of obtaining satisfaction of any moneys due to him under the charge to enter upon the land charged, subject to the right of any persons appearing on the register to be prior incumbrancers, and to the liability attached to a mortgagee in possession.

We turn now to the plaintiffs' deed, by which the defendant, as beneficial owner, in consideration of advances by the plaintiffs not exceeding in all £2,000, charged the lands, the subject of this action, with all such advances. There follows the usual covenant for payment of principal and interest, and an assent by the defendant to the registration of the charge as a burden affecting the lands. The deed is expressly made subject to certain conditions, No. 4 of which provides that all the powers conferred upon mortgagees by the Conveyancing Act, 1881, shall apply to the security, subject to certain variations, which are not material for our present purposes. Mr. Campbell, for the defendant, also relied upon condition 5, by which it was provided that the powers of leasing and agreeing to lease conferred on a mortgagor in possession by the Act of 1881 should not be exercised without the consent in writing of the plaintiffs. We fail to see how this latter condition in any way advances his case.

In form the deed is thus a simple charge, which, taken by itself, confers no estate in the lands on the plaintiffs; and the only question, therefore, which remains for our consideration is whether either the Registration of Title Act, 1891, or the powers conferred upon mortgagees by the Conveyancing Act, 1881, which are incorporated, as above mentioned, by condition 4 of the deed, alter the legal position, and give such right of entry to the chargeants.

(1) [1904] 2 I. R. 357. (2) 10 Ch. D. 15, at p. 24. (3) 1 N. I. J. R. 13.

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NORTHERN BANKING CO. *v.* DEVLIN.

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In examining the provisions of the Act of 1891, the first thing which impresses one is the absence of any express right of entry, such as is contained in sect. 25 of the English Act of 1875. Mr. Campbell says that the explanation of this omission lies in the fact that in the intervening years the Conveyancing Act, 1881, had been passed, conferring, as he submits, by sect. 7, sub-s. 1 (*c*), a power of entry on a mortgagee in default of payment of the principal money or interest secured by his deed, which power is, he contends, extended by sect. 40 of the Act of 1891 and condition 4 of the deed of charge to the registered owner of a charge. He submits that it would accordingly have been mere surplusage to have inserted in the Act of 1891 an express right of entry in favour of a chargeant.

Turning to sect. 40, which, it is admitted, is the sheet-anchor of the plaintiffs' case, Mr. Campbell in the first place relies strongly upon sub-s. 2, which, providing for the execution of an instrument of charge in the creation of all charges under the Act, enacts that until the owner of the charge is registered as such that instrument shall not confer on the owner of the charge any interest in the land. He submits that, as the plaintiffs' charge has been duly registered, they have under the concluding words of the sub-section, which I have quoted, an estate in the lands on which they can maintain ejectment. But this argument is, in our opinion, based on a confusion of the terms "estate" and "interest," which are by no means synonymous. The term "interest," used in a wide sense, may include, no doubt, estates, legal and equitable; but it may also include charges and other rights in respect of property. In a narrower sense the term "interest" is used as opposed to "estate," and therefore denotes rights in property not being estates, e.g. an interesse termini, or the interest of executors under a devise of land for the payment of debts: Coke Litt., 345 (*b*) and 42 (*a*). Mr. Murphy called our attention to this distinction during the argument, referring to the passage in 21 Halsbury, p. 169, to the effect that, where the mortgage is not made by conveyance, but by way of charge only, the mortgagee takes no estate in the premises, but has an equitable interest enforceable by sale. An argument based on the necessary synonymity of the words "interest" and "estate" is, therefore, obviously fallacious and misleading.

The plaintiffs, in the next place, rely upon sub-s. 4 of sect. 40, which provides that on registration of the owner of a charge on land . . . the instrument of charge shall operate as a mortgage by deed within the meaning of the Conveyancing Acts, 1881, 1882; and the registered owner of the charge shall, for the purpose of enforcing his charge, have all the rights and powers of a mortgagee under a mortgage by deed. Mr. Campbell submits that these rights and powers include, as above indicated, a power of entry under sect. 7, sub-s. 1 (*c*), of the Conveyancing Act, 1881; but there are, as it appears to us, several answers to this argument.

In the first place, whilst it is true that the covenant for quiet enjoyment set out in that section contains words extending to a

right of entry in default of payment of the mortgage debt, the section is not expressive, as he assumes, of a mortgagee's powers, but only of the implied covenants on the part of a mortgagor who purports to convey as beneficial owner. That the remedy for breach of any such covenant lies in damages only is, we think, indisputable law. It is clearly recognised by the Master of the Rolls in the *National Bank* v. *Hegarty* (1), where, referring to the bank's power of selling through the Court, with incidental rights of obtaining the appointment of a receiver and an order for possession, he says that the bank declined to take this remedy, and wanted an ejectment to recover possession. "This," he adds, "is an ejectment by a person claiming to be entitled to the lands under a covenant made with him by a person who has broken it. There is no case in the books in which on mere covenant, apart from conveyance of any estate or grant of title, there has been an ejectment decree."

A second reason why, in our opinion, the provisions of sect. 7, sub-s. 1 (*c*), of the Conveyancing Act, 1881, cannot be relied upon by a chargeant under the Act of 1891 is that sect. 40, sub-s. 4, in mentioning the rights and powers of a mortgagee under a mortgage by deed, obviously refers to those mentioned in sect. 19 of the Act of 1881, which opens with the words, "A mortgagee, where the mortgage is made by deed, shall by virtue of this Act have the following powers . . ." These powers do not include a right of entry. Sect. 40, sub-s. 4, is not intended to refer, nor does it in fact refer, to sect. 7, sub-s. 1 (*c*), of the Act of 1881, which implies a covenant in a conveyance made by a person who conveys as beneficial owner in relation to the subject-matter expressed to be conveyed by him. A deed of charge is not such a "conveyance" within the meaning assigned to that word by sect. 2, sub-s. 5, of the Conveyancing Act, 1881. It is obviously not an "assignment, lease, or settlement"; and, though Mr. Campbell argued that it was an "assurance," his contention is answered by the accepted definition of that word given by Kay L.J. in *In re Ray* (2).

It only remains to add that the plaintiffs' case is not advanced further by the words of condition 4 of the deed of charge already referred to. The reasons which we have assigned for our opinion that the provisions of sect. 7, sub-s. 1 (*c*), of the Act of 1881 do not assist the plaintiffs, and are not incorporated by sect. 40, sub-s. 4, of the Act of 1891, provide an equally effectual answer to the argument that such provisions, including an alleged power of entry, are incorporated by condition 4 in the deed of charge.

The decree for possession given by the County Court Judge must be reversed, with £10 16s. 3d. costs in the County Court and of the appeal, such costs to be set off against moneys due by the defendant to the plaintiffs. The defendant will also be entitled to his costs of the case stated and of the hearing before us, measured at the sum of £15.

Solicitor for the plaintiffs: *F. J. Byrne.*
Solicitors for the defendant: *O'Hare & O'Hagan.*

J. M'C.

(1) 1 N. I. J. R. 13, at p. 14.

(2) [1896] 1 Ch. 468, at p. 476.

L. C.
Wylie J.
1924.

March 20.

ESTATE OF SIR E. C. NUGENT AND ANOTHER, CO. MEATH.

Landlord and tenant—Demesne—Farm usually occupied therewith—Land Act (I.F.S.), No. 42 of 1923, sect. 24, sub-s. 2 (c).

A tenant's holding, which consisted of a small demesne and of a large farm held separately, but used together, *held* to be a "holding usually occupied by a person in connexion with a demesne," within sect. 24, sub-s. 2 (*c*), of the Land Act (I.F.S.), No. 42 of 1923.

OBJECTION on behalf of Lady Mowbray and Stourton, as tenant of a holding on the estate of Sir E. C. Nugent and Mrs. Banks, County Meath, to the particulars of the said estate furnished by the owners thereof to the Irish Land Commission on the ground that the said holding was not mentioned in the particulars.

The holding, consisting of part of the townland of Colvinstown, in the County Meath, formed part of a settled estate of which Lady Mowbray and Stourton is tenant for life. Portion of the holding, containing 278 acres Statute measure, was held from Sir E. C. Nugent and Mrs. Banks under a lease dated 1st June, 1867, which contained a covenant by the lessee to "occupy the said farm and lands hereby demised as a grass farm only, and will not during this demise have more than 30 acres of the said farm and lands in tillage." That lease expired, and since then up to the passing of the Land Act, 1923, the lands have been held under a yearly tenancy subject to the yearly rent of £500. The remaining portion adjoining Corbalton Hall, where Lady Mowbray and Stourton lives, is marked on the Ordnance Survey map as demesne lands.

Jellett K.C., for the tenant:—

This holding consists of two parts. The smaller portion is tenanted demesne and the larger portion is a farm not used in connexion with a demesne. It should have been included by the landlord in the particulars furnished to the Irish Land Commission, which should be amended accordingly. The onus is on the landlord to show that the holding is not agricultural or pastoral. The terms of the lease show that the object of the letting was not residential. Till this onus is discharged by the landlord no question arises as to whether it is demesne or residential. A letting of 278 acres cannot have as its main

object a residence: *Crookshank* v. *Law* (1); if it be a demesne it cannot be residential, but must necessarily be agricultural or pastoral. The social position of the tenant does not affect the character of the holding: *Moonan* v. *Cunningham* (2); *Furlong* v. *Thompson* (3). The agricultural and pastoral portion might have become demesne by being incorporated in a demesne: *Power* v. *Crosbie* (4); *Allen* v. *Grogan* (5); *Pratt* v. *Gormanston* (6); *Magner* v. *Hawkes* (7); and also it may lose that character: *Griffin* v. *Taylor* (8). Here it has been incorporated in the demesne, and being tenanted demesne it is not excluded from the Land Act by sect. 24, sub-s. 2 (*c*).

Poole, for the landlords:—

The holding is usually occupied by the tenant in connexion with her demesne and is therefore excluded from the Land Act by sect. 24, sub-s. 2 (*c*).

WYLIE J.:—

I am surprised that the tenant of this holding, who is the owner of this demesne, is making this application. She is deliberately abandoning the safeguarding provisions of the Act and making it possible to have the holding taken for the several purposes of the Act. The application, however, having come before me I must decide it. Mr. Jellett says that the holding is now incorporated in the demesne and is "tenanted demesne"; that it is therefore not excluded, as only "untenanted demesne" is excluded.

I am of opinion, however, that it is a holding usually occupied by a person in connexion with a demesne and therefore excluded by the second branch of sub-s. 2 (*c*) of sect. 24. I accordingly refuse the motion with £15 15s. costs.

Solicitors for the landlords: *Baker, Ringwood, & Gordon.*
Solicitors for the tenant: *Wm. Roche & Sons.*

H. H.

(1) 27 I. L. T. R. 2.
(2) [1895] 2 I. R. (C.A.) 1.
(3) 29 I. L. T. R. 98.
(4) 35 I. L. T. R. 49.
(5) 32 L. R. Ir. (L.C.) 179.
(6) [1894] 2 I. R. 279, 557.
(7) 32 L. R. Ir. 285.
(8) 16 L. R Ir. 203.

M. R.
(I. F. S.)
1923.

In the Matter of the Estate of MULROY, Deceased. M'ANDREW, Plaintiff, *v.* MULROY, Defendant.

Nov. 28.
Dec. 10.

Appeal.
1924.

May 6, 23.

Donatio mortis causa —Validity — Symbolic dominion — Key of cash-box — Complete parting with dominion—"Stale" cheque good subject-matter of donatio mortis causa.

Deceased lived in the house of his brother, the defendant, and shortly before his death told him to bring him a cash-box, which contained a deposit receipt and two "stale" cheques. The key of the cash-box was in the deceased's waistcoat pocket, and he opened the cash-box with it and took out the papers, saying, "Here is all belonging to me; I am sorry I have not more to give you. You were very good to me. You will do the same for me as you did for Kitty and Tom." The papers were then put back in the cash-box, which was locked by the deceased himself, who put the key back into his vest pocket. The deceased died intestate, and the defendant was granted administration of his estate. He included the deposit receipt and the two cheques in the schedule of assets of the deceased.

Held by the Court of Appeal (Molony C.J. and O'Connor L.J., Ronan L.J. dissentiente), affirming the judgment of O'Connor M.R., that there was no valid donatio mortis causa, inasmuch as the deceased never intended to part with the actual possession of the documents in such a way as to lose dominion and control over them during his life.

Adjourned memorandum for decision of donatio mortis causa claimed by defendant. The plaintiff was a sister of the deceased, Michael Mulroy, who died intestate on the 27th March, 1922. For many years he had lived with his brother, James Mulroy, the defendant. On the 24th March, 1922, deceased was in bed very ill, and he called defendant to his bedside and requested him to bring him a cash-box, and then asked for his waistcoat, took the key of the cash-box out of the waistcoat pocket, unlocked the box, and took out a deposit receipt for £650, a cheque for £104 2s. 9d. from the Congested Districts Board, and a cheque for £33 10s. from a Mrs. Gallagher. Deceased then said: "Here is all belonging to me; I am sorry I have not more to give you. You were very good to me. You will do the same for me as you did for Kitty and Tom." Defendant had arranged for the funeral of his brother, Thomas Mulroy, and his sister Kate. The papers were then returned to the cash-box, and the cash-box locked and the key returned to the deceased's waistcoat pocket. On June 21st, 1922, administration intestate was granted to the defendant, and the deposit receipt and the two cheques were included in the schedule of assets of deceased.

Leonard K.C. (with him *Carson*), for the plaintiff:—

There was no complete delivery, as the deceased never parted with dominion over the property. The retention of the key is

the whole question: *Hawkins* v. *Bluett* (1); *Treasury Solicitor* v. *Lewis* (2); *Reddell* v. *Dobrie* (3); *In re Johnston* (4); *In re Wasserberg, Union of London and Southern Bank, Limited,* v. *Wasserberg* (5); *In re Dillon, Duffin* v. *Duffin* (6).

Jellett K.C., Lardner K.C. (with them *Conor Maguire*), for the defendant:—

The true test in this case is, was there an intention to give and also complete delivery. We submit that the evidence on both these points is conclusive.

Ward v. *Turner* (7); *Porter* v. *Porter* (8); *Clement* v. *Cheeseman* (9); *Laws* v. *Rand* (10); *Tate* v. *Hilbert* (11).

O'CONNOR M.R.:—

The question involved in this case is whether a good "donatio mortis causa" by the deceased of his property to his brother has been made. There are three items in question—a deposit receipt and two cheques—constituting practically all the property the deceased possessed. It is admitted that there may be a good donatio mortis causa of a deposit receipt or a cheque. The cheques in this case were what are known as stale cheques; but it is admitted that a stale cheque stands in the same position as one current in the ordinary way, so there is no question of whether there could or not have been a good donatio mortis causa of these three items of property, and the only question is whether there was in fact a good transfer of property.

Approaching this question, it is to be remembered what the relations were between the deceased and the defendant. They were brothers, and apparently on the most intimate terms and much attached to each other. The deceased had lived with his brother, the defendant, all his life. During the last few years of his life he was a confirmed invalid, suffering from, and dying of, diabetes; and latterly he was confined to his bed. He received every attention in the house of the defendant, and was apparently nursed by the defendant's wife. One would expect that if any person more than another would be the object of his bounty it would be the defendant, because he owed everything to him; and if he had made a will leaving the defendant everything he had, that was exactly what one would expect. In the same way, if by any act inter vivos he had transferred everything he had to the defendant, it is what one would expect. The question in this case is whether he did in fact make an effectual and legal transfer of the property during his life. There is no necessity at this time of day to go elaborately into the law which regulates

(1) 2 Esp. 633.
(2) [1900] 2 Ch. D. 812.
(3) 10 Simons, 244.
(4) 92 L. T. 357.
(5) [1915] 1 Ch. 195.
(6) 44 Ch. D. 82.
(7) White and Tudor, Leading Cases, vol. i, p. 415.
(8) [1895] 1 I. R. 285.
(9) 27 Ch. D. 631.
(10) 3 C. B. (N. S.) 442.
(11) 2 Ves. 111.

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donationes mortis causa; sufficient to say that there is one element which must be present, that is, there must be a complete parting with the dominion over the subject-matter by the donor; and the question in this case is whether there was such a complete parting with the dominion.

The evidence upon this is, in the first place, that of the defendant. Having stated that the deceased had lived with him and died with him, the defendant says that deceased was quite strong up to four days before his death. On the 24th March, 1922, he was in bed; the defendant was out working; he came into the house for dinner; there were also present Patrick Cafferty, P. J. O'Grady, Daniel Mulroy, James M'Keown, and the defendant's wife. The deceased was in bed, not exactly in the kitchen, where all were assembled, but in a little room adjoining it, or recess communicating with it. The deceased said to the defendant, "Jamesie." The defendant answered, "What, Michael?" The deceased said, "Bring down the cash-box." The defendant got the cash-box. It was locked. The deceased then asked for his vest. The defendant gave it to him. The deceased called the defendant, "Come here." At that time the box was open. The way in which it was opened was undoubtedly this: the key was in the deceased's waistcoat, and either the deceased or someone else took the key out of the waistcoat and opened the box. The box having been opened, the deceased said: "Here is all belonging to me; I am sorry I have not more to give you. You were very good to me. You will do the same for me as you did for Kitty and Tom." They were a deceased brother and sister, and defendant had given them decent burial, had had certain Masses said, and a tombstone erected over their grave. This was what the deceased meant by the reference to Kitty and Tom. Nothing else was said. The defendant then said that the deceased did not put the papers—meaning, of course, the deposit receipt and cheques—into his hands, but he afterwards corrected this, and said that the deceased did put the papers into his hands, which, of course, would be a delivery.

That is practically the evidence of the defendant. There is more detailed evidence afterwards. The defendant, on cross-examination, said that when he got the papers from the deceased he, the defendant, handed them to his wife, and that they were put in an envelope. Whether the defendant or his wife put the papers in the envelope is not quite certain, but that is unimportant.

The next witness is Daniel Mulroy, who was present on this occasion. He states that he was working for the defendant, two or three days before the death of the deceased. His testimony is that deceased called James to his bedside, and asked him to give him his cash-box and hand him his waistcoat, and defendant did so. The deceased then himself took out of his waistcoat pocket the key, opened the cash-box, took out the papers, and gave them to the defendant, and said: "I am sorry I haven't

more. You will do for me what you did for your brother and sister''—that is, the two who had died. Then the deceased said he was afraid he would do no good, and said something about money for Masses. This does not put the case much further; but it is to be observed that according to this evidence the deceased himself took the key out of his own waistcoat pocket and opened the cash-box.

The next witness is Peter O'Grady. The important part of his evidence is in his cross-examination by Mr. Leonard. He says that the defendant having got the papers—that is, the deposit receipt and the cheques—put them back into the box, and then that the deceased himself locked the box, and, having locked it, put the key back into his own waistcoat pocket, and then the defendant put away the box and the waistcoat. That is very important evidence on the question as to whether the deceased had parted with the dominion over these papers. The deceased had not the actual dominion of the papers when he was in bed. He was a poor dying man, on his death-bed, not able to move about. He had, of course, notionally the dominion over his own property, and the symbol of his dominion over the cash-box and its contents was this, that the key of the cash-box was kept in his own waistcoat. Any dominion, therefore, he had was nothing more than a symbolic dominion over the papers in the cash-box of which the key was in his waistcoat pocket. To say that he had actual dominion is to overlook the fact that he had no physical dominion over anything, and the question is whether he had parted with the symbolic dominion and given it to someone else during his lifetime.

When he handed the papers to James, James kept them only for a very few minutes, and then put them back into the very box from which they came, and that was locked by the deceased himself, who put back the key into his pocket. That did not change the dominion in the least degree. The same symbolic dominion remained after the transaction took place, so that on that evidence I could hardly hold that there was a parting of the dominion over the property.

The next witness is the defendant's wife, Mrs. Mary Mulroy. Her evidence is that when the defendant came in, the deceased asked for the box and his waistcoat, and that the deceased told the defendant to unlock the box. This contradicts the evidence of a previous witness, who says that the deceased himself unlocked the box. Mrs. Mulroy goes on to say that deceased said, ''Here are my cheques. I am sorry I haven't more. I am giving you a gift of these cheques. You will do for me as you did for Tom and Kitty.'' It is a very remarkable thing that this lady introduces these words, ''I am giving you a gift of these cheques.'' They were very proper words for describing a complete donatio mortis causa. I doubt very much if the deceased did make use of these words. I think that the lady must have heard a discussion as to the elements necessary to make a good donatio

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mortis causa, and had in her mind the word "gift." However, I do not rely very much on that. She then said that James put the papers in an envelope and handed the envelope to her, and she describes how the papers in the box were in an old note-book, and that they were put into that book in order that they might not be creased. Having got the papers which had been put in an envelope either by herself or her husband, she put back the papers in the envelope into the box. Why did she do that? What was the necessity for it? The papers which were delivered to her husband were carefully put into an envelope. If the papers were given to her husband, it is inconceivable that she, apparently a clever woman, would not have some place among her own or her husband's belongings to put the envelope. One would have thought that she would have kept them apart. Then she says that it was the defendant relocked the box, and that he gave her the key. She was not quite confident of this, because she afterwards said only that she thought he gave her the key. She said that the box was left back in the room, that is, an adjoining room; that the deceased's vest was left at the end of the bed; and then she makes this remarkable statement: "James put the key back into the vest." Into whose vest? Into the deceased's vest. And where was the vest kept, according to her? At the end of the deceased's bed. As I have said, the deceased before this transaction had nothing more than a symbolic dominion over this property. He was not able to exercise real physical possession. The symbol of dominion was the key, kept in his personal possession symbolically by being placed in his own waistcoat pocket, and after the transaction the key was replaced in his own waistcoat pocket; and according to this lady, the waistcoat is left at the end of his bed. It occurs to me from that that there was no change of dominion at all over the property, and that this transaction lacks one of the essential elements of a donatio mortis causa — that is, the complete parting of the dominion over the subject-matter of the alleged gift.

There is, of course, some little conflict of testimony as to who opened and who locked the box; but it appears to me on the evidence of the witnesses who appeared for the defendant that there was no complete parting with the dominion. On this fact alone I would be prepared to hold that there was not a good donatio mortis causa. But the matter does not rest there. The defendant took out administration, and he verified the schedule of assets. In that schedule he returns this deposit receipt and these cheques as portion of the assets of the deceased. It is almost inconceivable to me that he relied at that time on a donatio mortis causa, and I do not think that he should be allowed to do so now, having returned these as assets. The schedule contradicts his evidence given in Court.

On all the facts of the case I am of opinion that there was not a good donatio mortis causa, and I must hold that these sums were assets of the deceased.

R. R

The defendant appealed to the Court of Appeal (1).

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May 6, 23.

Jellett K.C., Lardner K.C. (with them *Conor Maguire*), for the appellant.

Leonard K.C. (with him *Carson*), for the respondent.

The arguments were similar to those in the Court below. In addition to the authorities there cited, the defendant relied on *In re Hawkins, Watts* v. *Nash* (2).

MOLONY C.J. :—

In this case the Master of the Rolls came to the conclusion that the evidence did not establish a good donatio mortis causa; and, after a careful examination of the evidence, I am not disposed to differ from him.

In order to establish an effective donatio mortis causa three things must combine, as was laid down in *Cain* v. *Moon* (3), per Lord Russell C.J., p. 286 : "First, the gift or donation must have been made in contemplation, though not necessarily in expectation, of death; secondly, there must have been delivery to the donee of the subject-matter of the gift; and thirdly, the gift must be made under such circumstances as show that the thing is to revert to the donor in case he should recover." As regards delivery, it was established in the *Union of London and Smith's Bank, Ltd.*, v. *Wasserberg* (4), that an inchoate or imperfect delivery of chattels may be sufficient for effectuating a donatio mortis causa. In that case the testator, when about to undergo a serious operation, expressed in the clearest possible way a desire to give to his wife certain bonds to bearer, which he had in his locked box in the bank; and having discussed the matter with the assistant manager, he put his wife's name on the outside of the parcel containing the bonds, and locked it up in his locked box; and having done this in the presence of his wife, he left the locked box with the bank, and gave his wife a list of the bonds, telling her to keep it safely. After they had reached home, he gave his wife a bunch of keys containing the key of the locked box, and told her to lock them up with the list of the bonds, which she accordingly did, in a drawer in her own room, of which she had always kept the key. The same day the testator went into a nursing home, where he shortly afterwards died; and it was held by Sargent J. that the delivery of the key transferring to the wife a partial dominion over or part of the means of getting at the box, though not a sufficient delivery to support a gift inter vivos, was under the circumstances a sufficient delivery to effectuate a donatio mortis causa. Sargent J. observed in the course of his judgment, p. 202 : "With regard to the incident at the bank, the case of *Cochrane* v. *Moore* (5) shows that mere

(1) Before MOLONY C.J., and RONAN and O'CONNOR L.JJ.
(2) [1924] W. N. 131.
(3) [1896] 2 Q. B. D. 283.
(4) [1915] 1 Ch. 195.
(5) 25 Q. B. D. 57.

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Molony C.J.

words of gift are not in themselves sufficient, but there must be delivery. If the testator had actually given the parcel to his wife, and she had handed it back to him for the purpose of safe custody, that would probably have been enough; but the facts are, I think, that the testator did not at any time during that incident part with the custody of the bonds."

The question of the effect of a redelivery of bank notes for the purpose of safe custody was discussed this year in the case of *In re Hawkins, Watts* v. *Nash* (1). In that case the testator, on his death-bed, handed over to his niece bank notes for £5,000, and to her husband bank notes for £2,000, and clearly indicated that the money was to be theirs respectively after his death. The niece, after having got possession of the notes, asked the testator if she should put the envelope in his deed-box for safety against fire, and upon the testator assenting, she took the key from a nail in the wall facing the testator's bed, unlocked the box, placed the envelope in the box, which she replaced under his bed, and she hung the key up again on its nail. It was contended on behalf of the niece and her husband that there was such a complete delivery of the notes as was sufficient to constitute a valid donatio mortis causa to each donee, and that the redelivery of the notes to the testator for safe custody on behalf of the donees did not affect the previous gift. P. O. Lawrence J. said in delivering judgment: "The only difficulty lay in the question whether the placing of the notes in the deed-box of the testator for safe custody destroyed the effect of the previous delivery by restoring to the donor possession of the notes."

Dealing with certain cases, including the case of *In re Wasserberg* (2) and *Bunn* v. *Markham* (3), he said: "In the present case the previous effectual delivery was unaffected by the subsequent part of the transaction, namely, the placing of the envelope, with the donor's assent, in the deed-box by the donees for safe custody. The testator therefore was, until his death, merely the custodian of the notes for the donees. There was nothing in *Bunn* v. *Markham* (3) inconsistent with the proposition that when once the gifts (mortis causa) were complete, the subsequent agreement by the donor to take back the notes for safe custody did not affect the prior gifts."

In the case now before us the deceased man, who was a confirmed invalid, and died four days afterwards, on the 24th of March, asked his brother, the defendant, with whom he lived, to bring him down his cash-box; and it having been brought to him, he opened it with a key which was in his vest pocket, and the vest was at the foot of the bed, and having opened it and taken out the three documents—namely, deposit receipt and two cheques—he called the defendant to his side, and said: "Here, Jamesie, is all belonging to me, all my property; and I am sorry I haven't more to give you; you were very good to me." And he added: "You will do for me the same as you did for Kitty and

(1) [1924] W. N. 131. (2) [1915] 1 Ch. 195. (3) 7 Taunton, 224.

Tom," which was understood by the parties to mean to provide money for Masses and a monument. Nothing else was said; but it does appear that the documents were put into the hands of the defendant. Had the defendant thenceforward retained possession of the documents, there would have been strong evidence in favour of a donatio, but it appears that after the defendant had got possession of the documents he put them back into the box, and that the deceased himself locked the box, and having locked it, put the key back into his own waistcoat pocket, and then the defendant put away the box, and restored the vest containing the key to the place where it had previously been, at the foot of the bed. All this happened within the space of a couple of minutes, and the effect of the transaction is that, notwithstanding the gift, the deceased man had exactly the same dominion over the property that he had before. If the defendant had asked to be allowed to put the documents back into the box for safe custody, and the deceased had assented to this, *Watts* v. *Nash* (1) shows that this would not have destroyed the effect of the gift; but the unexplained replacing of the documents in the box immediately afterwards leads to the belief that the deceased never intended to part with the actual possession of the documents in such a way as to lose dominion and control over them during his life.

The case is one of some difficulty, and I hesitated in coming to a conclusion; but on the whole I cannot bring myself to differ from the Master of the Rolls in his conclusion, and consequently I think the appeal ought to be dismissed.

RONAN L.J.*:—

I have very great difficulty in this case. Donatio mortis causa depends on the intention with which certain acts are done, and the first matter we must try to ascertain is the intention with which the acts were done here. The testator was in bed; there was a box containing some documents belonging to him, and this box also contained documents belonging to the donee of the alleged donatio mortis causa.

The evidence of the defendant is that when he (the defendant) came into the kitchen, where Michael was in bed, he said to him, "Jamesie." I said, "What, Michael?" "He told me to bring him down the little cash-box." The deceased therefore started the transaction by asking James for the box. What did he want the box for? Was it to see if the things were in it or not, or was it to do something with them? The witness continues, in reply to the question, "Was it locked or open?": "It was locked." "Who opened it?" "Michael." "Where did he get the key?" "He asked me for his vest. I got the vest and gave it to him." "What did he do with it?" "I didn't see what he did. He called me again, 'Jamesie, come here.'" "Was the box open when you went there?" "It was." "What did he say after he

(1) [1924] W.N. 131.

* This judgment has not been revised by Ronan L.J.

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Ronan L.J.

said 'Come here'?'' ''He said, 'Here, Jamesie, here is all belonging to me, all of my property; and I am sorry I haven't more to give you; you were very good to me.' '' He did not hand him the box with the documents in it. That is a very important distinction between this and other cases. He handed him the very documents themselves. Beyond all doubt, if the transaction ended there, there was on the evidence a good donatio mortis causa. But a donatio mortis causa can be revoked by the donor just as a legacy can; and the question in this case appears to me to be whether this complete donatio mortis causa was revoked. It could have been revoked by an act or statement of the donor showing that he intended to destroy the effect of what he had done, and to resume the entire control of the property himself. No further statement by him was proved. No further act by him was proved. Taking the evidence as a whole, I am not satisfied that there is anything proved sufficient to show that the donor said or did anything to revoke the gift he had already made. However, my view is immaterial, the majority of the Court holding the other way.

O'CONNOR L.J.:—

I am of opinion that the appeal should be dismissed.

Counsel for the appellant asks us to split the transaction into two: the one a transfer of the possession of the documents to his client, and the other a retransfer of them from his client to Michael on the terms of Michael keeping them on trust for the appellant. If this were the effect of the transaction, the case would be within the authority of the case in the Weekly Notes, to which we have been referred. That, however, is not the view I take of the matter at all. The whole business took only a couple of minutes or so; when it was all over, the position of the documents and the indicium of the control over them were precisely where they always were; the documents were in the deceased's box, and the key of the box was in the deceased's pocket. The momentary tradition of the documents into the hands of James seems to me quite consistent with its being done for the purpose of showing to James the property the deceased intended to give him, and of enabling James afterwards to claim them. For, I think, there was an intention to benefit James; but that is a different thing from transferring the possession to James. The transfer of possession is the element necessary; it is, in my opinion, not alone not established by the evidence, but is negatived by the transaction, taken as a whole.

Solicitors for the plaintiff: *Bourke & Carrigg.*
Solicitor for the defendant: *John J. Smith.*

H. J. M'C.

KEELAN *v.* GARVEY.

(1923. No. 496.)

Molony C.J. (for *M.R.*) (*I. F. S.*)
1924.
April 9.
May 13.

Statute of Limitations—Husband and wife—Husband in possession of lands as tenant—Husband going away and wife remaining in possession—Acquisition of title by wife as against husband under Statute of Limitations—Real Property Limitation Act, 1833 (3 & 4 *Wm.* 4, *c.* 27), *sect.* 7—*Position of wife under the Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *sects.* 1, 2, 12 — *Wife's title registered "free from equities"—Application to rectify register—Register conclusive evidence of title—Effect of mistake in law as distinguished from mistake of fact in registering title—Local Registration of Title* (*Ir.*) *Act*, 1891 (54 & 55 *Vict. c.* 66), *sects.* 29, 30, 34, 92, 93.

K., who was tenant of a farm of land, having quarrelled with his wife, left the farm in November, 1897. His wife remained in sole possession of the farm up to the time of her death in 1923. With the exception of two letters written to his wife after leaving the farm, in one of which he stated he was going abroad (though he did not do so), K. had no communication with his wife, and never returned to the farm during his wife's lifetime. After her death he claimed to be beneficially entitled to the farm (which his wife had purchased under the Land Purchase Acts), and sought a declaration that his wife's executor held the farm as trustee for him.

Held, that the wife had acquired a title to the land under the Statute of Limitations, the evidence being conclusive as to her exclusive possession and full beneficial enjoyment.

Sect. 1 of the Married Women's Property Act, 1882, enables a wife to acquire, even as against her husband, a title to land.

The wife having been recognised as tenant by the landlord, entered into an agreement in November, 1906, with the landlord to purchase the holding under the Land Purchase Acts, and in August, 1909, the holding was vested in her, and in November, 1909, she was registered under the Local Registration of Title (Ir.) Act, 1891, as owner in fee-simple, "subject to equities." In November, 1919, she applied to the Land Registry to discharge the equities, and, the facts having been placed before the Examiner, he decided that her title under the Statute of Limitations was proved, and accordingly the note as to rights and equities was cancelled.

Held, that under sect. 34 of the Local Registration of Title (Ir.) Act, 1891, the register was conclusive evidence of the title of the owner to the land, and, although the Court has jurisdiction on the ground of actual fraud or mistake to direct the register to be rectified, no fraud had been alleged, and the Examiner had not made any mistake. And even if a mistake had been made by the Examiner, it would not have been a mistake of fact, but in the application of law by the registering authority, and in such a case the remedy would not lie by rectification under sect. 34, but in an application for indemnity out of the insurance fund provided by sects. 92 and 93.

TRIAL OF ACTION.

By this action, which was tried by Molony L.C.J., sitting for the Master of the Rolls, the plaintiff sought a declaration that he was beneficially entitled as owner in fee simple to a farm

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of land situate in the townland of Corduff, in the County of Monaghan, and a further declaration that Catherine Keelan, his late wife, signed an agreement on the 1st November, 1906, to purchase the land under the Land Purchase Acts as his representative or bailiff, and that she held the lands as trustee for him, and that the defendant, who was her executor, held the lands as such trustee.

The following statement of facts is taken from the judgment of the Lord Chief Justice:—"Patrick Keelan, the father of the plaintiff, Peter Keelan, was tenant of the lands in question, and by his will dated 15th June, 1896, he bequeathed the said lands to the plaintiff, subject to certain charges which have long since ceased to affect the same. He died on the 22nd June, 1896, and the will was duly proved on the 13th November, 1896. On the death of the said Patrick Keelan the plaintiff went into possession of the lands, and on the 30th February, 1897, he married Catherine Ward, who is hereinafter referred to as Catherine Keelan. He had a difference with his wife in November of the same year, with the result that he left the farm. After leaving home he wrote her two letters, one from Dundalk to say that he was going abroad, and the other from Liverpool asking her to sell the oats and to pay some £16 or £17 he owed. From that time he completely went out of her life. He never wrote again to her or went near the place, and he stated in his evidence that he wanted nothing out of the place and had no intention of going near it as long as she was there. Catherine Keelan seems to have been quite capable of taking full control of the place, and was recognized by the landlord as tenant of the farm."

On 1st November, 1906, Catherine Keelan signed an agreement with her landlord to purchase the holding under the Land Purchase Acts, and on 26th November, 1909, she was registered as owner in fee simple subject to equities, and, ultimately, on 10th November, 1919, she was registered free from equities in the circumstances set out in the judgment of the Lord Chief Justice. Catherine Keelan remained in sole possession of the farm until the date of her death, which occurred on 17th March, 1923. Probate of her will was granted on 16th April, 1923, to the defendant, James Garvey, who was her sole executor.

Overend K.C. (with him *Lardner K.C.* and *Geoghegan*), for the plaintiff:—

By the common law husband and wife are one person, and the Statute of Limitations cannot run in favour of a wife in occupation of her husband's property. He can bring no action against her. In no case, even in respect of his property, can a husband sue his wife for a tort during coverture: Halsbury's Laws of England, vol. 16, par. 947. Sect. 12 of

the Married Women's Property Act, 1882, was never intended to give a wife her husband's property in cases where the time limit under the Statute of Limitations applied. Here there is a trust in favour of the husband.

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M'Cann K.C. (with him *Lavery*), for the defendant:—

We rely (1) on the Statute of Limitations and (2) on the Local Registration of Title (Ireland) Act, 1891. As regards the Statute of Limitations, it is contended by the plaintiff that, notwithstanding the Married Women's Property Act, 1882, husband and wife are still one person, and that the possession of the wife is the possession of the husband; but it is submitted that that Act has completely altered the general status, in reference to property rights, as between husband and wife, and that the unity of husband and wife for such purpose no longer exists: Married Women's Property Act, sects. 1, 2, 5; *Sands* v. *Dooley* (1). A wife can contract with her husband and can sue her husband: *In re Hastings*; *Hallett* v. *Hastings* (2).

The proper inference in the present case is that the wife was put in either as owner or tenant at will, and, on either hypothesis she acquired a statutory title: 3 & 4 Wm. IV, c. 27, sect. 7; *Woodhouse* v. *Hooney* (3). As regards the Local Registration of Title (Ireland) Act, 1891, under sect. 34 the register is conclusive evidence of the title. No doubt the Court has power under that section to direct the register to be rectified where there is actual fraud or mistake, but no fraud is alleged here, and even if there was a mistake it was a mistake of law made by the Registrar in the exercise of a judicial discretion, and such a mistake would not be a ground for rectification.

Cur. adv. vult.

MOLONY C.J.:—

May 13.

The plaintiff has brought this action seeking for a declaration that he is beneficially entitled as owner in fee simple to a farm of land situate in the townland of Corduff, in the County of Monaghan, being the lands entered on Folio 4489 of the Register, County of Monaghan. He also seeks a declaration that Catherine Keelan, his late wife, signed the Land Purchase agreement as representative or bailiff of the plaintiff, and that she held the lands merely as a trustee for the plaintiff, and that the defendant, as her personal representative, now holds them as such trustee.

The defence raised the Statute of Limitations, and states that Catherine Keelan was in sole beneficial occupation and possession of the lands from November, 1897, until her death

(1) 46 L.L.T.R. 197. (2) 35 Ch. D. 94. (3) [1915] 1 I. R. 296.

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in 1923, without acknowledging the title of the plaintiff or any other person, and also relies on the fact that she was registered as owner of the said lands discharged from equities.

In his reply, the plaintiff avers that the said Catherine Keelan was in possession as the wife of the plaintiff and on his behalf, and that no lapse of time was sufficient to confer on her a title to the said lands as against her husband under the Statute of Limitations; and alternatively, that she was in possession thereof as the bailiff or agent of the plaintiff.

There is no real dispute as to the material facts of the case, which may be shortly summarised as follows:—[His Lordship stated the facts as already set out, and continued:—]

On the 1st November, 1906, Catherine Keelan entered into an agreement with the landlord under the provisions of the Land Purchase Acts for the purchase of the said holding. In May, 1909, the advance was sanctioned, and in August, 1909, the holding was vested in her. On the 26th November, 1909, she was registered as owner in fee simple subject to equities, and she so remained for ten years until, upon the 6th November, 1919, she applied to the Land Registry to discharge the equities.

By his rulings the Examiner required independent evidence to prove who was in sole beneficial occupation of the lands as tenant from year to year from 1st January, 1890, to the 26th November, 1909, and as to Peter Keelan having gone away and not having been heard of. In order to satisfy this requisition affidavits were filed by Catherine Keelan and also by one, Patrick Carragher, which set out the fact of the departure of Peter Keelan from the lands in November, 1897, and that he had not since been heard of.

The Examiner considered, and I think reasonably considered, the title of the said Catherine Keelan under the Statute of Limitations to be proved by these affidavits, and accordingly the note as to rights or equities was cancelled on the 10th November, 1919, and Catherine Keelan thereupon became owner of the lands discharged from equities. Catherine Keelan remained in undisturbed possession of the said lands and made her will appointing the defendant to be her sole executor. She died on the 17th March, 1923, and probate of her will was granted to the defendant on the 16th of April, 1923.

Shortly after the death of the said Catherine Keelan, a sister of the plaintiff took forcible possession of the place, and subsequently discovered the plaintiff, who, it turned out, had not gone to America at all but had spent his entire life in the neighbourhood of Dublin, or between it and the Curragh of Kildare.

When the plaintiff went away in 1897 Catherine Keelan became, at least, a tenant at will of the lands: *Woodhouse* v. *Hooney* (1). If the husband had come back at intervals, or in any way assumed the character of owner, it would, of course,

(1) [1915] 1 I. R. 296.

have prevented the Statute of Limitations from running: *Doe* v. *Groves* (1). But here the plaintiff, according to his own evidence, never made any claim to the place, or asked for anything out of the place for over twenty-five years. It is, however, contended on behalf of the plaintiff that, being his wife, Catherine Keelan was necessarily his agent or bailiff and could not assert an independent possession.

Whatever may have been the position of a wife under such circumstances before the Married Women's Property Act of 1882, I am of opinion that no such contention is now possible. Sect. 1, sub-s. 1, of the Act provides: "A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee." This section, in my opinion, enables a wife to acquire, even as against her husband a title to land.

Sect. 2 of the Act then provides: "Every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage or shall be acquired by or shall devolve upon her after marriage." And sect. 12 provides that she shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also the same remedies and redress by way of criminal procedings, for the protection and security of her own separate property, as if such property belonged to her as a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. There is also a proviso dealing with criminal proceedings with which we are not concerned in the present case. These sections have been considered in a number of cases, and the general effect may be stated to be that the period of limitation ran both in favour of, and against, a married woman as if she were unmarried. See *Lowe* v. *Fox* (2) and *In re Hastings*; *Hallett* v. *Hastings* (3).

Of course in the majority of cases it may be difficult for a wife to prove that she had acquired a title in her husband's lands under the Statute of Limitations, but the evidence in this case is conclusive as to her exclusive possession and full beneficial enjoyment.

I am in a position to decide this case apart from the question which has been raised under the Local Registration of Title (Ireland) Act, 1891. Catherine Keelan was registered as owner of the lands free from equities, and, under sect. 34, sub-s. 1, of the Act the register shall be conclusive evidence of the title of the owner to the land as appearing thereon. But this provision is not to interfere with the jurisdiction of this Court on the ground of actual fraud or mistake, and the Court

(1) 10 Q.B. 486. (2) 15 Q.B.D. 667. (3) 35 Ch. D. 94.

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may, upon such ground, make an order directing the register to be rectified in such manner and on such terms as it thinks just. Mr. Overend admits that there was no fraud in this case, but he contends that there was a mistake. It is, however, abundantly clear that the entire facts were brought under the notice of the Examiner in the Land Registry, and that there was no mistake upon his part; and even if there had been a mistake, it would not have been a mistake of fact, but in the application of the law by the registering authority, and in such case the remedy would not lie under sect. 34 but in an application for indemnity against the insurance fund provided by sects. 92 and 93.

The result is that the plaintiff's case fails, and the action must be dismissed with costs.

Solicitor for the plaintiff: *F. M. Duffy.*
Solicitor for the defendant: *Patrick Marron.*

R. R.

HUGHES, DICKSON, AND COMPANY, LIMITED, *v.* BERNARD HUGHES, LIMITED (1).

(1924. No. 35.)

Ch. Div. (N. I.) Wilson J. 1924. May 8, 12.

Landlord and tenant—Specific performance—Covenant for renewal of lease—Right of lessees to renew lease although a prior lease had been made to trustees for debenture holders.

Lessees entered into possession of certain premises under a lease for a term of twenty-five years, which contained a covenant to give the lessees a further lease for the remainder of the lessors' term, provided that notice requiring renewal was given to the lessors at least twelve months previous to the end of the term. The lease contained a further covenant entitling the lessees to take a lease of certain other premises, should they elect to do so within six months of the execution of the original lease. Having so elected and entered into possession of these latter premises subject to a precisely similar covenant for the extension of the lease, and Moore and Andrews L.JJ. (affirming Wilson J.) having held that the lessees were entitled to new leases for the residue of the terms of the lessors in the premises (*Bernard Hughes, Ltd.*, v. *Hughes, Dickson, & Co., Ltd.*, [1923] 1 I.R. 121), the lessees now sought specific performance of the covenants to renew contained in these two leases.

Held by Wilson J., that the lessees were entitled to have these covenants specifically performed, notwithstanding the existence of a prior debenture trust deed demising the premises for the unexpired residue of the term to trustees for the debenture holders of the company, the lessees agreeing to take such title as the lessors could give them.

TRIAL OF ACTION.

By indenture of lease dated September 23rd, 1904, certain flour mill premises in Divis Street, Belfast, were demised by the present defendants to the present plaintiffs for a term of twenty-five years from November, 1904, subject to the yearly rent of £300, and to the covenants and conditions therein contained, and particularly to a covenant on the part of the lessors which was in the following terms:—"And in case the lessees require the lessors to do so, the lessors hereby covenant to execute to the lessees, their executors, administrators, and assigns a lease of said premises hereby demised for the remainder of the lessors' term and interest on receiving a notice in writing to that effect at least twelve months previously to the end of the term hereby granted."

The lease contained a further covenant, "that the lessees, their executors, administrators, or assigns shall be at liberty at any time within six months from the execution of these presents to elect to take the cooling pond at present in the possession of the said lessors, at the rear of the premises hereby demised, at and subject to the yearly rent of £35 and should the said lessees hereby agree to execute a separate lease of said cooling pond at the said rent, and on the like terms and conditions as are hereinbefore set out with regard to the premises hereinbefore demised."

(1) In the Chancery Division (N.I.), before WILSON J.

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In pursuance of the covenant in respect of the cooling pond contained in the lease of September 23rd, 1904, the present defendants demised said cooling pond to the present plaintiffs by lease dated September 7th, 1905, for the term of twenty-five years from November 1st, 1904, subject to the yearly rent of £35, and to the covenants and conditions therein contained, and particularly to a precisely similar covenant to that contained in the lease of 23rd September, 1904, for an extension or renewal of the lease.

Proceedings were instituted by way of originating summons to determine questions arising upon the construction of these covenants, and it was held (1) by the Court of Appeal (N.I.), affirming Wilson J., that the present defendants were bound to execute to the present plaintiffs new leases for the residue of the terms of the defendants in the premises.

The plaintiffs then instituted the present action claiming specific performance of these covenants.

The defendants by their defence pleaded that by indenture of lease dated the 15th day of February, 1894, they had demised the premises contained in the leases of 23rd September, 1904, and 7th September, 1905, to certain persons upon the trusts therein declared as security to the debenture holders of their company, and that said premises were now vested in Hugh Reynolds Rathbone, under an indenture of appointment of new trustees dated 4th day of June, 1913. They also pleaded that they had not such estate or interest in the premises as would enable them to grant valid leases, that the trustee for the debenture holders had refused to assent to the granting of the leases, and that they ought not to be ordered to execute the leases without such assent.

Megaw K.C., *Pringle K.C.*, and *Warnock*, for the plaintiffs:—

The defendants are setting up an equity against our legal title. We are entitled to waive any covenant which is for our benefit: see Fry on specific performance, 6th edition, p. 175. We will take such title as defendants can give us to the premises, and so come in under *Bennett* v. *Fowler* (2). Our rights against the mortgagor are perfectly clear. We are entitled to every right against the trustees that the mortgagor had. *Tarn* v. *Turner* (3). We are assignees in fact for the purposes of this case. We are not seeking to bind the trustee for the debenture holders. The trustee cannot approbate and reprobate, and will get the premises free of any lease. For the purposes of this action we are entitled to the rights of Bernard Hughes, Limited, as against the trustee. The trustee is not entitled to a fictitious value on the premises. The decree for specific performance would not be a nullity, and we rely on *Tarn* v. *Turner* (3).

(1) [1923] 1 I. R. 121. (2) 2 Beav. 302. (3) 39 Ch. D. 456.

[They also referred to: *Howell* v. *George* (1); *Costigan* v. *Hastler* (2); *Beister* v. *Stutely* (3); *Weatherall* v. *Geering* (4); *Willmott* v. *Barber* (5); *Leitch* v. *Simpson* (6); *Hassard* v. *Fowler* (7).]

M'Gonigal K.C., *Murphy K.C.*, and *M'Sparran*, for the defendants:—

The debenture trust deed contains no express power of leasing either to the trustees or to Bernard Hughes, Limited. We submit that the defendants, when the leases were made to the plaintiffs, had nothing more than the statutory power of leasing given by sect. 18 of the Conveyancing Act, 1881. It follows that each of these leases, though good against the defendants, was void as between the plaintiffs and the trustees for the debenture holders. We contend that the defendants are not bound, and cannot be compelled, to make these leases to the plaintiffs; indeed, they could be restrained from doing so in an action by the trustees for the debenture holders.

The trustee for the debenture holders will not assent to the granting of these leases.

We submit that, in the circumstances, this is not a case in which specific performance can be decreed.

May 12.

WILSON J.:—

It appears that this action is entirely between Bernard Hughes, Limited, and Hughes, Dickson, and Company, Limited. There is a question whether certain covenants contained in leases of 23rd September, 1904, and 7th September, 1905, constitute a good contract. An order has already been made by this Court, and affirmed by the Court of Appeal, to the effect that the lessees were entitled to new leases.

I am bound by the order of the Court of Appeal to give relief as asked for in this action, provided there is nothing in this case to disentitle the plaintiffs to a decree for specific performance. Damages would not cover this case. It is said that the contract contained in leases of 1904 and 1905 is of no use to plaintiffs because of the prior demise by defendants to the trustees for the debenture holders. In my judgment in the circumstances of the present case a lease cannot be made for more than twenty-one years so as to bind the mortgagees. Unless a lease is within the powers of the Conveyancing Act it would prima facie be void against the mortgagees. The debenture trust deed is a very peculiar document; it provides that the mortgagees are not to be at liberty to enter into possession unless "the Company shall

(1) 1 Madd. 1.
(2) 2 Sch. & Lef. 160.
(3) 27 L.J. (Ch.) 156.
(4) 12 Ves. 504.
(5) 15 Ch. D. 96.
(6) I.R. 5 Eq. 613.
(7) 32 L.R.I. 49.

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make default in the payment of any principal moneys or interest which ought to be paid in accordance with these presents for a period of one month after any of the dates when same should be paid." It is clear that the mortgagees are not at liberty to enter into possession so long as the interest is paid and the Company shall not have committed any other breach of the obligations imposed upon it. The trustees for the debenture holders have thus no power to interfere until default has been made. It is clear that Messrs. Hughes, Dickson, and Company got the benefit of occupation for more than twenty years under the original lease; what is to prevent them from continuing to get that benefit for another twenty years, if they are willing to take it?

I am not convinced by the arguments adduced on behalf of the defendants that the order granting specific performance of these covenants would be futile, and I am bound by the previous order of this Court, as affirmed by the Court of Appeal. The plaintiffs are entitled as against the defendants in this action to the declarations asked for that the covenants referred to in the two indentures of leases dated 23rd September, 1904, and 7th September, 1905, respectively, shall be specifically performed, the plaintiffs being satisfied with such title as the defendants, Bernard Hughes, Limited, can give them. Accordingly I refer the matter to Chambers to settle the leases in the event of the parties not agreeing to the form thereof.

Nothing I have said can in any way prejudice the rights of the debenture holders. If they or their trustees have any right to question the leases when granted, that right can be enforced in some properly constituted action to which they are parties; and it may be that as trustees of a term which has not been entered upon they may not be able to question the leases; and if the term is entered on under their deed they may be redeemable by the plaintiffs as assignees in part of the equity of redemption. The defendants must pay to the plaintiffs the costs of the action when taxed and ascertained up to and including the hearing, and I reserve all other costs and grant liberty to the parties to apply as they may be advised.

Solicitors for plaintiffs: *White, M'Millan, & Wheeler.*
Solicitors for defendants: *Daniel O'Rorke & Son.*

J. M'C.

HOWDEN BROTHERS, LIMITED, *v.* ULSTER BANK, LIMITED, AND HUGH BOYD AND THE OLDERFLEET SHIPBUILDING AND ENGINEERING COMPANY, LIMITED (1).

Ch. Div.
(N. I.)
Wilson J.
1924.

May 14, 15.
June 10, 11, 16.

(1924. No. 85.)

Sale of goods—Dredger—Payment by instalments—"Ordinary shipbuilding agreement"—Passing of property—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *sect.* 4, *sub-s.* 1, *sects.* 16, 18, *rule* 5—*Admissibility of parol evidence—Written documents not intended to record all the terms of contract.*

The O. S. & E. Company, Ltd., a firm of shipbuilders carrying on business at Larne, Co. Antrim, agreed to build a dredger hopper barge for the plaintiffs, according to certain terms.

On 14th August, 1919, the plaintiffs verbally gave the O. S. & E. Co., Ltd., the order for building the dredger at price of £11,000; a rough specification was produced, and it was arranged that a full specification should afterwards be made, and that the dredger was to be built according to the terms of "the usual shipbuilding agreement." On the same day a letter was subsequently written to the O. S. & E. Co., in which the plaintiffs stated: "We confirm order given you to-day to build a dredger hopper barge," &c. Instalments of the price were paid by the plaintiffs at various stages of construction, but before the dredger was fully completed the company went into liquidation, and a receiver on behalf of the debenture holders took possession of the dredger.

Held by Wilson J., that parol evidence was admissible to prove the real contract between the parties, and that, on the first instalment being paid, the property in the portion then finished became, by virtue of the contract, vested in the plaintiffs, and that material subsequently added became, as it was added, the property of the plaintiffs.

TRIAL OF ACTION.

Action by the plaintiffs to recover damages for the detention of a dredger hopper barge, which they allege was detained by the defendant, Hugh Boyd, the receiver appointed by the Ulster Bank, Limited, debenture holders of the Olderfleet Shipbuilding and Engineering Company, Limited. In the year 1919 the plaintiffs, who required a dredger hopper barge for use in Larne Harbour, entered into negotiations with the Olderfleet Shipbuilding and Engineering Company, Limited. On the 14th August, 1919, a meeting took place at the office in Larne of the Olderfleet Shipbuilding and Engineering Company, Limited. It was agreed to give the order to that Company. Mr. Harbinson, the plaintiff's managing director, wrote a letter dated 14th August, 1919, saying, "We confirm order given you to-day to build dredger hopper barge, and stating amongst the particulars the following: 'to be completed and all ready for fitting for the sum of £11,000, and to be completed and built as early as possible.'" On 16th August,

(1) In the Chancery Division (N.I), before WILSON J.

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1919, the Olderfleet Company replied: "We thank you for your esteemed order of 14th inst.," &c., and continued: "The above price is based on current rates of labour and materials; should there be any further increase in the cost of production, the price quoted will be increased by such amount as will cover the entire cost to us." On 22nd August, 1919, the plaintiffs wrote stating they had received the letter of 16th August, but "the last paragraph is not correct, as there was nothing arranged as to our paying any increase in cost of production, the figure of £11,000 being a fixed price." At the meeting held on 14th August, 1919, Brown, on behalf of the Olderfleet Company, ordered M'Intyre to make out a full specification. M'Intyre asked what about payments, and Brown replied that the dredger would be built on "the usual shipbuilding agreement." Shortly afterwards a full specification for the building of the dredger was received by the plaintiffs. The Olderfleet Company, in December, 1919, having adapted their usual form of agreement, which included payment by instalments, demanded payment of £647 5s. 9d. for materials alleged to have been supplied to their yard for this vessel. The plaintiffs returned this demand to the Olderfleet Company, who, however, continued to insist on this demand. The plaintiffs, in a letter of 18th May, 1920, stated, "As we said before, we will not pay anything on account until the keel is laid." On 5th August, 1920, after inspection, £2,000 was paid by the plaintiffs as first instalment to the Olderfleet Company on laying the keel; on 25th August, 1920, the sum of £2,000 was paid as second instalment; the third or shell instalment of £3,000 was paid on 17th November, 1920; and the fourth or launch instalment of £3,000 on 23rd December, 1920. There had thus been paid up to this date the sum of £10,000 out of £11,000, leaving £1,000 to be paid on completion.

On 10th September, 1920, the plaintiffs had advanced the Olderfleet Company the sum of £10,000 to bear interest equivalent to bank overdraft rate and to be used to pay the further instalments of the price of the vessel as and when they became due. After this all further instalments as they became due were debited against this deposit of £10,000.

The Olderfleet Company were not able to complete their contract, and on 11th February, 1921, the plaintiffs tried to take possession of the dredger, but were prevented by the receiver appointed by the Ulster Bank, Limited, who had entered into possession of the Company's property as debenture holders. In the month of December, 1920, the plaintiffs no longer wanting the dredger for their own work, had entered into negotiations for the purpose of selling it to the Lancashire and Yorkshire Railway Company; and on the 11th March, 1921, the Lancashire and Yorkshire and London and North-Western joint companies agreed to purchase the vessel complete for £19,500, to be delivered at Fleetwood on 2nd May, 1921, and, if not so delivered, the contract to be at an end.

This offer was put before the defendants, who had refused to deliver the boat to the plaintiffs; but no arrangements could be made with the defendants to release the boat and take advantage of this good offer to purchase. The writ in this action was then issued, on 16th March, 1921, in the High Court of Justice in Ireland, claiming a return of the dredger and damages for its detention. The defence, denying that the dredger was the property of the plaintiffs or that the defendants detained it, was filed on 8th April, 1921, and issue was joined in the action on 14th April, 1921. An order for winding up the company under the Companies Acts was made on the 22nd March, 1921. Several further attempts were made to get the boat released for the purpose of sale, and eventually, by an order made in the liquidation of the company on 28th June, 1921, by the Right Hon. Mr. Justice Powell, it was ordered that the official liquidator be at liberty to enter into an arrangement with Messrs. Howden Brothers, Ltd., that they should take over the dredger in dispute on their lodging in the Bank of Ireland, in the joint names of the official liquidator and Messrs. Howden Brothers, Ltd., and to the credit of deposit account, the sum of £4,500, the said sum to remain to such credit until this action should have been disposed of, and to abide the order of the Court, such arrangement to be without prejudice to the rights of the several parties claiming an interest in the said ship; but such rights to be transferred to and to attach to the said sum of £4,500 in lieu of the said ship. The £4,500 was lodged in the bank; the ship was released and completed, with engines, &c., and sold to the London and North-Western and Lancashire and Yorkshire Railway Companies for £14,000 on the 2nd of September, 1921.

S. L. Brown K.C., Herbert Wilson K.C., Megaw K.C., Pringle K.C., and *Warnock*, for the plaintiffs:—

The substantial question at issue is, in whom was the property in the dredger on 11th February, 1921, as it then stood? The agreement is partly oral and partly in writing, and therefore we are entitled to give oral evidence of the agreement.

[*Beattie K.C.*, for the defendants, objected to anything being referred to which was prior to the agreement in writing, and asks that the agreement should be produced.]

The contract is in writing to the extent of being partly constituted by letters. There is nothing to prevent evidence of a verbal contract being given, so long as it is not inconsistent with the written contract. In fact the full terms of the verbal agreement were never reduced into writing. The terms were to be those contained in the "usual shipbuilding agreement." The contract consists of the letters plus the oral agreement entered into on 14th August, 1919, that the dredger was to be built on "the usual shipbuilding agreement," the terms of which are to be found in the printed form.

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There is the sum of £4,500 which represents the dredger. If we are right this sum is ours. This is a common law action for detinue and damages. The Ulster Bank, Limited, are liable to us to the amount of £5,500 as special damage. *France* v. *Gaudet* (1).

The liability of the Ulster Bank is a question of law. The Ulster Bank is liable for the acts of the receiver, and stands in the shoes of the Olderfleet Company, so far as Howden Brothers is concerned.

If the contract was partly written and partly oral, and so far as oral on the "usual shipbuilding agreement," which included clause 4 of the printed form, there is an end of the case. The vessel as she was constructed would have passed to Howden Brothers, Limited. *Seath & Co.* v *Moore* (2).

Assuming that the contract is silent, the Court is bound to draw the inference from the payment of instalments, that the property in the vessel had passed to Howden Brothers: *Clarke* v. *Spence* (3); though of course payment by instalments is not conclusive, and can be cut down by express contract. *Laing & Sons, Limited,* v. *Barclay Curle & Company, Limited* (4). This last case is clearly distinguishable because in it the property was not to pass until completion of a second trial. Here, so far as the contract was in writing, it was at a fixed price; so far as it was oral, it simply fixed the terms of "the usual shipbuilding agreement" and the property passed to Howden Brothers under clause 4 of the printed form. Alternatively on the facts, we ask, in the absence of anything to the contrary, that the inference should be drawn that the property passed when the first instalment was paid.

[Mr. W. J. Harbinson, managing director of the plaintiff company, having been called as a witness for the plaintiffs, objection was made by *Babington K.C.* on behalf of the defendants, that no evidence other than the written contract was admissible.]

Babington K.C.: We submit that the contract is at a fixed price for a completed ship, and this contract cannot be varied by oral evidence. The parties have reduced their own contract to writing; this written document is complete in itself. We submit that the law is that where the parties have reduced their own contract to writing it cannot be added to. No evidence can be given to construe a document which must be construed by itself. We submit that there is a complete contract in writing. The only contract that can be looked to is the contract in writing, as the alleged verbal contract contradicts the original contract: Halsbury, vol. 10, p. 444, note "t"). We contend that the evidence is not admissible, and should be ruled out. Supreme importance is attached by the plaintiffs to this evidence. It is sought to impart into the contract two absolutely

(1) L.R. 6 Q.B. 199.
(2) 11 A.C. 350.
(3) 4 A. & E. 448.
(4) [1908] A.C. 35.

contradictory terms: 1, payment by instalments; and 2, express agreement that property is to pass on payment of first instalment. We say this is a concluded contract on the letters. We rely on the whole chain of authorities including: *Ford* v. *Yates* (1); *Evans* v. *Roe* (2); *Inglis* v. *Buttery & Co.* (3); *Bristol Tramways Carriage Company, Limited,* v. *Fiat Motors, Limited* (4); *Kinlen* v. *Ennis Urban District Council* (5); Halsbury, vol. 10, p. 444, par. 782. Apart from the oral evidence, there is a clear contract to do a certain thing at a certain time and to be paid a certain price.

S. L. Brown K.C., in reply for the plaintiffs:—

The parties did not intend that the letters should contain a complete and final record of the whole transaction. The law on the subject is stated in Benjamin on Sale (6th edition), p. 262, and in Stephen's Digest of the Law of Evidence (5th edition), article 90.

Wilson J. admitted the evidence on the ground that the contract was not necessarily confined to the letters.

Babington K.C., *E. S. Murphy K.C.*, *Beatty K.C.*, and *Hume*, for the defendants:—

It cannot be shown that there was any contract to pass the property in an incompleted state. This was a contract for a completed vessel. There is no term in the letters as to payment by instalments, nor do they contain anything referring to "the usual shipbuilding agreement." The work was to be done in a short time, and therefore one would not expect to find any term that the property should pass as the work proceeded. The contract is one which could be sued upon as it contains all the necessary terms.

The letters adequately express the whole contract. We submit that there was a contract by which the parties were bound and to which they had assented. *Lewis* v. *Brass* (6). The fact that some other matter was to be provided for does not prevent this from being a completed contract.

The plaintiffs had no right to take possession without the consent of the Olderfleet Company, and that this company never gave them possession.

Even supposing that the parol evidence is properly admissible, it merely proves that "the usual shipbuilding agreement" was incorporated, including clause 4 of the printed form. There is no such thing as a "usual shipbuilding agreement," and no evidence has been given as to any custom in the trade referring to usual shipbuilding agreements. There cannot be any such "usual shipbuilding agreement," unless it

(1) 2 Man. & G. 549.
(2) L. R. 7 C. P. 138.
(3) 3 A. C. 552.
(4) [1910] 2 K. B. 831.
(5) [1916] 2 I. R. 299.
(6) 3 Q. B. D. 667.

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is certain, definite, and clear, well understood, and universally known. The parol evidence having been admitted, the Court can look at all the evidence. It does not necessarily follow from payment by instalments that the property passed, as they became due. These two things are absolutely distinct. There never was any agreement to pay instalments, and it is clear that Mr. Harbinson did not understand what a "usual shipbuilding agreement" was. An agreement cannot be made with reference to a contract which was not in existence at the time of the agreement. There is no evidence that the property was to pass to the purchaser on the payment of the instalments, nor that there was any appropriation to the contract with the consent of both buyer and seller. The proposition contended for here on behalf of the plaintiffs is not borne out by *Seath* v. *Moore* (1), and we rely strongly on *Laing & Sons, Limited,* v. *Barclay Curle & Company* (2). Here there was no stipulation as to when the property should pass. The payments by instalment were not made in virtue of any contract, but by subsequent arrangement.

Cur. adv. vult.

June 16.

WILSON J.:—

This is an action by the plaintiffs to recover damages for the detention of a boat, on the 11th of February, 1921, which they allege was their property, by the defendant, Hugh Boyd, the receiver appointed by the Ulster Bank, who are debenture holders of the Olderfleet Shipbuilding and Engineering Company, Limited (which I will refer to as the company), under a claim that the boat was at all material times the property of the company, and that the plaintiffs were on 11th February, 1921, not entitled to possession of or the property in said boat. It is admitted that the defendants, the Ulster Bank (which I will refer to as the bank), are responsible for the acts or defaults of the defendant, Hugh Boyd. The plaintiffs are a Company carrying on business in Larne, and are greatly interested in the shipping in that port and in the state of the harbour of Larne. This Company was a new Company formed to take over the shipbuilding business in Larne of a Mr. Kane, and was incorporated on the 21st day of March, 1919. Mr. Harbinson and Mr. M'Kean, directors of the plaintiff company, took shares in the Company, and Mr. Harbinson became a director of the company. The plaintiffs wanted to get a dredger hopper for use in Larne Harbour. They applied to a firm across the water for quotations, and on the 14th August, 1919, the question arose whether the order for the dredger should be given to the Company. A meeting took place at the Company's office in Larne, and there were present:—Brown, managing director of the Company; Kane, a director of the Company; M'Intyre,

(1) 11 A. C. 350. (2) [1908] A. C. 35.

manager of the Company; and Harbinson, managing director of the plaintiffs' Company. The quotations for building the dredger were brought before the meeting, and fully discussed. It was agreed to give the order to the company, and Mr. Harbinson returned to the plaintiffs' office and wrote a letter dated 14th August, 1919, saying, "We confirm order given you to-day to build dredger hopper barge, &c., stating amongst other particulars the following: 'to be completed and all ready for fitting for the sum of £11,000 and to be completed and built as early as possible.'" On the 16th August the company replied, thanking the plaintiffs for the order of the 14th inst., &c., and stating that price was on current rates of labour, and if there were increases therein the price of the dredger would be increased accordingly. On 22nd August, 1919, plaintiffs wrote stating they had received letter of 16th, but "the last paragraph is not correct, as there was nothing arranged as to our paying any increase in cost of production, the figure of £11,000 being a fixed price."

The defendants contend that these letters contain the contract between the parties and cannot be added to or varied by parol evidence, and that the rights of the parties must be ascertained by their construction alone. They further say these letters are a complete contract, and on their construction it was a contract for a completed boat, and the property did not and was not intended to pass to the plaintiffs until completion and delivery of the boat by the Company to the plaintiffs on payment of the £11,000. I think the construction of these letters contended for by the defendants is correct, and this action would have to be dismissed if the plaintiffs are confined to these letters, as on their construction the law would imply that the property was not intended to pass until payment and delivery, as there is no express term in these letters to the contrary.

The important question arose at the very outset of the action, whether parol evidence could be given, in the face of these letters, to prove the real contract between the parties. For six reasons I ruled that it could:—1. The letters do not purport to be *the* contract between the parties. On their face they refer to a prior contract and confirm it. The words in the letter of 22nd August, 1919, accepted by the defendants' letter of 3rd September, 1919 (even if this latter letter was not received by the plaintiffs), "there was nothing arranged as to our paying any increase in cost of production," must refer not to the letters but to some arrangement prior to the letters. 2. These letters do not necessarily contain the whole contract and may contain only part of it. There is no reference to specification or to quality of work or length, breadth, or depth of dredger to be built or any express term as to payment such as one would expect in a complete contract, though no doubt the law could spell a complete contract out of the letters. 3. This contract need not necessarily have been

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in writing. 4. There has admittedly been part-payment to take it out of sect. 4, sub-s. 1, of the Sale of Goods Act, 1893, if that section applies to this case. 5. This action is not brought to enforce the contract in any way, but for damages for detention on the ground that as a result of the contract the property in the boat and the right to its possession had passed to the plaintiffs on the 11th of February, 1921. 6. The contract is executed and not executory.

I do not doubt or impugn the settled rule of evidence, that parol evidence is not admissible to add to, vary, or contradict a written agreement or any transaction in writing: *Meres* v. *Ansell* (1); but in this case I have come to the conclusion that the letters are not a written agreement and do not contain or purport to contain the whole transaction, and in allowing the evidence I follow the law laid down in Roscoe's Nisi Prius Evidence, 18th ed., p. 17; and *Allen* v. *Pink* (2), which decided that parol evidence of a verbal transaction is not excluded by the fact that a writing was made concerning or relating to it unless such writing was in fact the transaction itself and not merely a note or memorandum of it or portion of the transaction; and the judgment therein of Lord Abinger C.B., concurred in by Bolland and Alderson BB.: "The general principle is quite true that if there has been a parol agreement, which is afterwards reduced by the parties into writing, that writing alone must be looked to to ascertain the terms of the contract; but the principle does not apply here; there was no evidence of any agreement by the plaintiff that the whole contract should be reduced into writing by the defendant; the contract is first concluded by parol and afterwards the paper is drawn up, which appears to have been meant merely as a memorandum of the transaction or an informal receipt for the money, not as containing the terms of the contract itself." The case of *Lockett* v. *Nicklin* (3) comes nearest in its facts to the present of any of those I have read, and throws some doubt on the case of *Ford* v. *Yates* (4), relied on by Mr. Murphy for the defendants. In that case the defendant by letter ordered certain goods from the plaintiffs, and the letter stated, "if approved, as I told Mr. Lockett, I will give you further orders." The goods were sent with an invoice in the nature of a sold note showing parties, goods, and price, and stating nothing as to the time of payment. Similar orders were subsequently given and similarly dealt with; and plaintiffs then brought their action for the price, and the defendant tendered evidence to prove that there had been a conversation between the parties prior to the order for the goods, at which, inter alia, it was stated that defendant was to get six months' credit and pay them by a bill at three months, and that it was on these terms that the order for the goods was given. The evidence

(1) 3 Wilson, K. B. 276.
(2) 4 M. & W. 140.
(3) 2 Ex. 93.
(4) 2 Man. & G. 549.

was objected to and admitted, and a verdict found for defendant, leave being reserved to the plaintiffs to move to enter a verdict for them. At the trial Patterson J. admitted the evidence, not for the purpose of varying the contract, but of supplying the omission in the written documents as to the time of payment. The motion was argued before Barons Parke, Alderson, and Platt. I refer to all the judgments in that case, and the admission of the evidence and the verdict for the defendants were upheld, and the rule for a new trial was discharged. Again in *Hutton* v. *Warren* (1) Baron Parke says that the principle on which extensive evidence is admissible to annex incidents to written contracts is a presumption that the parties did not mean to express in writing the whole of the contract by which they intended to be bound. In *Angell* v. *Duke* (2) Blackburne J. says: "It is a most important rule of law that people should not add to or vary a written contract, which is the record of all the terms relating to the same matter agreed upon between the parties."

It is because it was alleged that the letters in this case on their face were not intended to be the record of all the terms agreed on between the parties that I admitted the parol evidence. If I was wrong in admitting this evidence, the judgment I delivered should be set aside, as the parol evidence materially affected my decision. It was proved to my satisfaction that the plaintiffs and the Company both knew of the quotations of the firm across the water for the building of dredgers, and that there was a full discussion about them, and a rough specification for the boat was produced at the meeting to which I have referred of the four persons on the morning of 14th August, 1919. Mr. Harbinson, on behalf of the plaintiffs, gave the Company the order for building this dredger. Brown, on behalf of the Company, ordered M'Intyre to make up full specification. Then M'Intyre asked what about payments, and Brown said: she would be built on the usual shipbuilding agreement. Harbinson, for plaintiffs, was satisfied with that, and knew, or thought he knew, what it meant. The company's representatives shook hands with Mr. Harbinson, representing plaintiffs, and thanked him for the order. Mr. Harbinson then retired, and the letters were written as already mentioned.

Mr. Harbinson took ill in October, 1919, and was away from business until 15th May, 1920; he again left at end of May, 1920, and began business again in November, 1920. A full specification for the building of the boat was shortly afterwards drawn up and received by the plaintiffs, and shown to Mr. Harbinson by Mr. M'Millen, the plaintiffs' superintending engineer; and I have no doubt it bound the parties. The usual shipbuilding agreement included payment by instalments after inspection, and the passing of the property in the boat so far as paid for on payment of

(1) 1 M. & W. 466. (2) 23 W. R. 548.

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instalment, subject to the shipbuilders' right to retain possession for completion of contract.

Mr. M'Intyre, manager of the company, proved that he asked: How are we to be paid? and Mr. Brown said: there would be the usual shipbuilding agreement, and it would be made out when they got their usual printed papers and forms, and this was agreed to. Brown prepared the specification, and copy was sent to the plaintiffs, and he said that the usual shipbuilding agreement for a fixed price meant that the payments would be made by instalments, and that the property in the boat so far as constructed would pass on payment of each instalment after inspection. This seems to me the result of the parol agreement, and complies with all the requirements of sects. 16 and 18, sub-s. 5, of the Sale of Goods Act, 1893. This was all corroborated by and consistent with what was done by the parties in carrying out the contract.

In the case of an executed contract the Court is entitled to take into consideration the terms of the contract, the conduct of the parties, and the circumstances of the case for the purpose of seeing when the property passed to the buyer. Mr. William A. Buchanan proved that he was secretary of the company from 1st December, 1919, and that several contracts were made by the company for building ships, including a contract for No. 2 ship, the form for which was supplied to the company by Messrs. Thomas M'Larne & Co., ship brokers, of Glasgow. This contract was dated 25th November, 1919, but was executed shortly after 1st December, 1919. He produced the original contract signed, to which he was a witness. By the order of the directors of the company, he had forms of the contract printed, and it was adopted by the company as their usual form of agreement, and all their subsequent contracts for shipbuilding were in accordance with this form. A blank printed form of this contract was produced, and proved by this witness. This blank form contains general clauses for, inter alia, inspection by the purchasers, payment by instalments, and the passing of the property to the purchasers in the vessel as constructed. Mr. Brown adopted this as the usual blank form to be used by the company in its contracts; no doubt subject to modifications to be made in each contract as the parties thereto might agree. Mr. Brown was the person who at the making of the contract on 14th August, 1919, said the payment would be on the terms of the usual shipbuilding agreement. The adoption of the blank form as the usual form of agreement by the company in December, 1919, is plainly corroborative that in Mr. Brown's mind on 14th August, 1919, the terms of the usual shipbuilding agreement included inspection by the purchaser, payment by instalments, and the passing of the property as the boat was constructed; and the defendants, who stand now in the shoes of Mr. Brown so far as this point is concerned, are bound by what he agreed to on 14th August, 1919. Again, the action of the parties confirms this view. The company, in December, 1920,

having adopted their usual form of agreement—which was or could have been known to the plaintiffs—demanded payment of £647 5s. 9d. for material alleged to have been supplied to their yard for this vessel. The plaintiffs returned this demand to the company. The letters of 26th February, 1920, 20th August, 1920, and 12th May, 1920, show that the company insisted on this demand, which was in accordance with their reading of clauses 2, 3, and 4 of their blank form. The plaintiffs' letter of 13th May, 1920, referring to this claim, curtly asks: "Inform us if the keel of this vessel is laid." The company's reply on 17th May, 1920, answered by plaintiffs on 18th May, 1920, stating: "As we said before, we will not pay anything on account until the keel is laid," shows that there were conversations about payments by instalments, the company insisting on payment as materials were brought into the yard for the vessel; and the plaintiffs insisting that the first instalment was only payable on laying the keel. This contention of the plaintiffs was acquiesced in by the company. Accordingly, on 5th August, 1920, after inspection, £2,000 was paid as first instalment on laying keel; on 25th August, 1920, £2,000 as second instalment; the third or shell instalment of £3,000 on 17th November, 1920; the fourth or launch instalment, £3,000, on 23rd December, 1920, making on that date £10,000 paid out of £11,000, leaving £1,000 to be paid on completion. Again, if one looks at the situation of the company financially, it is impossible to believe that the plaintiffs would have paid these instalments voluntarily, and not as part of a contract to pay them, on condition that the boat so far as paid for should become the property of the plaintiffs. Mr. Harbinson, managing director of the plaintiffs and director of the company, took ill, and during his illness was much annoyed at the situation of the company and the wrongful expenditure by the company on the extension and completion of the yard of moneys they had received as payments for boats under construction. Mr. M'Kean was induced to act as director temporarily during Mr. Harbinson's illness, and his most proper letter of 21st June, 1920, in which he stated: "I do not know whether the spending of the money you have received on account of the steamers on developing the yard is criminal or not, but, if not, it is in my opinion highly immoral," shows the financial position in June of the company; and the plaintiffs, in my judgment, would not have paid any more money until completion and actual delivery unless the plaintiffs had understood that the contract was as now contended for by them.

The transaction by which the plaintiffs advanced to the company £10,000 on 10th September, 1920, to bear interest equivalent to bank overdraft rate, and to be used to pay the further instalments of the price of the vessel as and when they became due, is only explicable on the same basis. There is enough in this case, in the verbal contract, in the conduct of the parties, and in the circumstances to show that the agreement and intention of the

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parties was that the property in the boat should pass to the plaintiffs as she was constructed, without having recourse to the judgments of the House of Lords in *Seath* v. *Moore* (1); but those judgments confirm this conclusion. I therefore hold that on 11th February, 1921, the property in the boat was in the plaintiffs; the company was not able to complete the contract; the plaintiffs tried to take possession of the boat, and were prevented by the defendant, the receiver appointed by the bank, who had entered into possession of the company's property as debenture holders.

The plaintiffs also contended that prior to the receiver for the bank taking possession of the boat on 11th February, 1921, the plaintiffs had got delivery of the boat, and had put one of their men on board, and taken over for plaintiffs the men who had been working on board thereto for the company. If the property in the boat had not already passed to the plaintiffs, I am of opinion that what occurred on the 11th of February, 1921, could not of itself pass the property in or right of possession of this boat to the plaintiffs. It was a scramble for possession of the boat, and no one who had authority to do so on behalf of the company consented to the plaintiffs taking possession of the boat on that occasion. Nothing further seems to have been done in the action until the 29th of October, 1923, when by consent an order was made in Dublin by Mr. Justice Pim transferring the action and such of the records of it as were left after the fire in the Four Courts, Dublin, to Northern Ireland; and it comes before me for decision. I hold that the property in the vessel had passed to the plaintiffs on 11th February, 1921; that the defendants illegally detained said vessel until after the 28th June, 1920; and that thereby the plaintiffs lost the benefit of the contract they had entered into for the sale of the vessel at £19,500 when completed, with engines, &c., and delivered at Fleetwood on 2nd May, 1920. After the vessel was released and completed, the plaintiffs sold the vessel for £14,000. By the action of the defendants the plaintiffs have lost £5,500. I accordingly give judgment for the plaintiffs in the action with costs, and order the defendants to pay to the plaintiffs the sum of £5,500 for damages, together with costs when taxed and ascertained; and I certify that discovery was right and proper on both sides in the action, and I allow the same; and I further order and declare that the plaintiffs are entitled to the sum of £4,500 lodged on deposit account in the Bank of Ireland in the joint names of the official liquidator of the company and Messrs. Howden Bros., Ltd., together with the interest accrued thereon.

Solicitors for plaintiffs: *Wheeler & M'Cutcheon.*
Solicitor for defendants: *H. H. Smiley.*

J. M'C.

(1) 11 App. Cas. 350.

IN THE MATTER OF THE COMPANIES (CONSOLIDATION) ACT, 1908, AND IN THE MATTER OF ROSS AND BOAL, LIMITED (1).

(1922. No. 279.)

Appeal. (*N. I.*) 1924.

June 11, 26.

Company winding up—Fixtures—Benches and power-driven sewing machines—Sewing machines not affixed to but resting on prepared positions on benches—Mortgagor and mortgagee.

R. & B., Ltd., carried on business as linen merchants in Belfast in a warehouse held under a long lease. The company went into voluntary liquidation; but previously the company's leasehold interest in the premises had become subject to an equitable charge to its bankers by assignment by way of mortgage by deposit of title-deeds.

The top floor of the premises was fitted with benches and power-driven sewing machines, which were used in connexion with the business carried on there, and there were also the necessary shafting and power arrangements for working the machines. The benches on which the sewing machines rested were affixed to the floor by spikes or bolts, and the shafting and plant in connexion with the power arrangements were affixed to the benches or to the walls or floor of the premises. The sewing machines were not permanently affixed to the benches in any way; they merely rested on prepared positions on the benches, and were held in position by means of easily movable attachments.

Held by the Court of Appeal, N.I. (Moore L.J. and Andrews L.J.), affirming the decision of Wilson J., that the sewing machines did not pass as fixtures to the bank under the equitable mortgage.

MOTION on behalf of the liquidator of Ross and Boal, Limited, for a declaration that the sewing machines which were in use in the company's warehouse premises, 11 Donegall Square, South, Belfast, at the commencement of the liquidation were movable machinery to which the liquidator was entitled for the benefit of the unsecured creditors.

The company carried on business as linen merchants, and owned the leasehold interest in a warehouse and premises at 11 Donegall Square, South, Belfast. At the date of the commencement of the liquidation the company's interest in these premises was subject to an equitable charge to the Ulster Bank, Limited, created by a deposit with the Bank of the company's lease and title deeds as security for its indebtedness to the Bank.

The top floor of these premises was fitted with benches and power-driven sewing machines used in connexion with its business; there were the necessary shafting and power arrangements for working the machines. At the commencement of the liquidation there were sixty sewing machines of various types on the premises.

(1) In the Court of Appeal (N.I.), before MOORE L.J. and ANDREWS L.J.

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Wilson J. held that the sewing machines were not part of the machinery which supplied the power, and that they did not pass as fixtures to the mortgagees, the Ulster Bank, Limited; the liquidator was therefore entitled to the proceeds of the sale of the machines.

The Ulster Bank, Limited, appealed to the Court of Appeal of Northern Ireland (1).

Murphy K.C. and *Hume,* for the appellants:—

This is a factory, and without a machine head the whole sewing or stitching system becomes useless. This machine head is a power-driven machine, and we submit that it must be looked upon as a readily movable part of an immovable system, and constitutes a fixture. It is not designed for use as a hand sewing machine at all; without the sewing machines the system becomes useless. The principle running through the cases is if there is immovable machinery, to which is attached a movable part, the whole becomes a fixture. *Place* v. *Fagg* (2); *Fisher* v. *Dixon* (3); *Mather* v. *Fraser* (4); *Sheffield and South Yorkshire Permanent Benefit Building Society* v. *Harrison* (5); *Monti* v. *Barnes* (6), a case in which dog-grates were held to be fixtures, was a most important decision.

We contend that the principle which applies to the present case is, that this machine head, though movable, is part of an immovable system, and therefore a fixture. The principle of *Monti* v. *Barnes* (6), that of improving the inheritance, is in our favour. We also rely on *Reynolds* v. *Ashby & Son* (7), a decision of the House of Lords.

We submit that Wilson J.'s judgment was wrong, especially in its view of what constituted a fixture, which need not necessarily be part of the motor-power machinery.

[They also referred to *Longbottom* v. *Berry* (8) and *Ex parte Astbury* (9).]

Pringle K.C. and *A. Black,* for the liquidator of the company:—

There is no evidence whatever of fixity in the present case.

The principle of *Monti* v. *Barnes* (6) does not apply here, as it was decided in that case that a fixture having been removed, what was put in its place was in the circumstances of the case also to be regarded as a fixture. There are two classes of machinery here which are sold as separate parts. The sewing machine remains unfixed to the freehold. No case can be found of an unfixed machine, complete in itself, being held

(1) In the Court of Appeal (N.I.), before Moore and Andrews L.JJ.
(2) 4 Man. & Ry. (K. B.) 277.
(3) 12 Cl. & Fin. 312.
(4) 2 K. & J. 536.
(5) 15 Q. B. D. 358.
(6) [1901] 1 K. B. 205.
(7) [1904] A. C. 466.
(8) L. R. 5 Q. B. 123.
(9) 4 Ch. App. 630.

to be a fixture simply by reason of the power. We rely on *Longbottom* v. *Berry* (1), which has been frequently approved of. The term "part of a system" has been continually used by Mr. Murphy K.C. in his argument, but in the cases the words are "part of a machine." The beaming-frame in *Longbottom* v. *Berry* (1), a case which was expressly approved of in the *Sheffield and South Yorkshire Permanent Benefit Building Society* v. *Harrison* (2), is exactly identical with what exists in the present case. Nothing can be a fixture unless it is an essential part of a machine. The two are admittedly quoted and sold as quite separate things, and nothing more has been done with the sewing machines since they came into the premises. The question of intention is the underlying consideration. In *Re Richardson, Ex parte Astbury, Ex parte Lloyd's Banking Co.* (3), weighing machines were held not to be fixtures, although practically attached. In *Lyon & Co.* v. *London City and Midland Bank* (4), chairs which were fastened to the floor of the building were held not to be fixtures. *Place* v. *Fagg* (5) and *Fisher* v. *Dixon* (6) were not cases between mortgagor and mortgagee. The principle that this was a stitching system, and that the movable heads which formed part of it were therefore fixtures, cannot be discovered in the decided cases. It is a fallacy to regard the whole system as one machine. There are in actual fact two machines. The movable machine is the principal thing, and the fixed power is merely accessory. We submit that the true principle is that laid down by Blackburn J. in his judgment at p. 335 in *Holland* v. *Hodgson* (7). The sewing machine is obviously a movable chattel and not attached to the shafting.

[They also referred to *Mather* v. *Fraser* (8) and *Metropolitan Counties Society* v. *Brown* (9).]

Murphy K.C., in reply:—

The true principle is that expressed by Collins L.J. in *Monti* v. *Barnes* (10). There is a substantial difference between the beaming-frame in *Longbottom* v. *Berry* (1) and the present case. The system indicates that there are various component parts of one machine, and the whole machinery constitutes one entity. A statement of what is included in the term "fixtures" will be found in Fisher on Mortgages (6th edition), p. 45, par. 73; and we submit that the law is correctly stated there, and that such definition supports the proposition we have been attempting to argue. The whole machinery culminates in the sewing machine, and we attach great importance to the expression that is used, "machine heads."

Cur. adv. vult.

(1) L. R. 5 Q. B. 123.
(2) 15 Q. B. D. 358.
(3) 4 Ch. App. 630.
(4) [1903] 2 K. B. 135.
(5) 4 Man. & Ry. (K. B) 277.
(6) 12 Cl. & Fin. 312.
(7) L. R. 7 C. P. 328.
(8) 2 K. & J. 536.
(9) 26 Beav. 454.
(10) [1901] 1 K. B. 205, at p. 208.

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June 26.

MOORE L.J.:—

The question for us in the present case is what are the fixtures which pass with the land as part thereof under an equitable assignment by way of mortgage by deposit of title deeds. This form of the proposition absolves us from all inquiry into the problem of trade fixtures which would arise were the parties in the relation of landlord and tenant.

Fixtures, as understood in our law, are prima facie those chattels which, by reason of some connexion either permanent or even temporary, have become annexed to the land. But the word may also in some cases include movable chattels which are taken to be annexed to the land by reason of their own weight, such as the cisterns in *Mather* v. *Fraser* (1) and the anvil on which a steam hammer falls (though not fixed in position otherwise than by its own weight); *Metropolitan Counties Society* v. *Brown* (2); chattels which form an essential part of other chattels such as machinery which is itself fixed such as the machinery in *Mathers* v. *Fraser* (1) and the copper rollers in *Ex parte Astbury* (3), though these are not at the moment for determination themselves fixed; and also chattels not otherwise fixed which have been brought on to the mortgaged premises for the benefit of the inheritance such as the statuary and vases in *D'Eyncourt* v. *Gregory* (4) and the "dog-grates" in *Monti* v. *Barnes* (5).

If I do not allude to other possible cases it is because I am not attempting an exhaustive description, but dealing only with the several heads under all or some of which, in the present case, the appellants claim to succeed. But the state of the law on this difficult question is well described by Lord Lindley in his speech in *Reynolds* v. *Ashby and Son* (6) (a House of Lords decision) where he says: "I do not profess to be able to reconcile all the cases on fixtures, still less all that has been said about them. In dealing with them attention must be paid not only to the nature of the thing and to the mode of attachment, but to the circumstances under which it was attached, the purpose to be served, and last but not least, to the position of the rival claimants to the things in dispute." He then refers to and explains *Trappes* v. *Harter* (7) and *Lyon* v. *London City and Midland Bank* (8). To the foregoing may be added the judgment of the Court of Appeal, per A. L. Smith L.J., that, in determining whether or not a chattel has become a fixture, the intention of the person affixing it to the soil is material only so far as it can be presumed from the degree and object of the annexation. *Hobson* v. *Gorringe* (9).

(1) 2 K. & J. 536.
(2) 26 Beav. 454.
(3) L. R. 4 Ch. A. C. 630.
(4) L. R. 3 Eq. 382.
(5) [1901] 1 K. B. 205.
(6) [1904] A. C. 473-474.
(7) 2 C. & M. 153.
(8) [1903] 2 K. B. 135.
(9) [1897] 1 Ch. 182.

All this amounts to a legal result (in which I respectfully concur) that, in dealing with the question of fixtures, it is difficult to generalise, and that attention must be paid to the special facts of each case.

Mr. Murphy has correctly described the operating mechanism here as "a system of machinery" for turning out a sewed, hemmed, or embroidered product.

The system is composed of three main heads:—1, the power and the rotary shaft conveying it; 2, the heavy bench which underneath supports the shaft of No. 1 and in a tray or depression on the surface receives the bottom of the sewing machine; and 3, the sewing machine itself, about which the present controversy has arisen; and I refer to these hereafter for the sake of brevity by their numbers, when convenient to do so. There is also below the bench a foot-treadle which is used for starting the machine, worked by a band on the sewing machine direct, but whether this is attached to 1 or 2 or to either of them does not appear.

It is admitted that Nos. 1 and 2 are fixtures in the general sense, and no argument has arisen as regards them.

For the claimants to succeed as regards No. 3 they must prove either that they are so annexed to 1 and 2 or that they are thereby part of the freehold, or, failing this, that they are essential parts of 1 and 2 viewed as machinery, or that they have been placed in their present position with the intention that they should become part of the inheritance; it does not matter in this respect whether the mortgagor was owner in fee simple or only a leaseholder. *Southport and West Lancashire Banking Co.* v. *Thompson* (1).

Dealing with these propositions in the order stated, let us see if, in the first place, the sewing machines are annexed to the building by their connexion with 1 or 2 or both. The sewing machine itself is in form like the sewing machine to which we are accustomed in our own houses, more stoutly built and apparently stronger and heavier and without a hand attachment, but about the same size, and it can be lifted out of the tray by one hand. So far as I can see its only attachment to No. 1 is by a driving-belt of leather which passes through slits made in the bench (No. 2) and so round the rotary shaft. It is connected with the treadle by a leather band, and the treadle at one point is screwed to the floor, but the treadle was not mentioned in argument, and no reliance appears to be placed on it.

The sewing machine is connected with No. 2, or perhaps I should rather say, held in position while working, by three things:—First, by its own weight to some extent keeping it in the depression or tray on the surface of the bench specially constructed to receive it; second, by what are described in par. 3 of Mr. Watson's affidavit as a hook or plug attachment

(1) 37 Ch. Div. 64.

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on the bench and corresponding attachments on the sewing machine, which fit in when the machine in in position; but when the correspondence is in fact made between the sewing machine and the bench (No. 2) these attachments are not themselves fastened together in any way. Third, by a small clamp or pin, a few inches in length, in shape like the letter L, sometimes in use and sometimes not, which can be adjusted by laying one limb over the edge of the machine and passing the other limb at right angles to it through a hole in the bench to be secured on the under side by a winged-nut. A winged-nut is so made that it can be used for tightening or loosening by the hand without the need of a wrench or key. It is essential to the working of the sewing machine that it should be frequently turned up so that the works which are under the plate of the machine can be inspected, or, if necessary, taken out, and this operation takes place in a few seconds, and therefore the clamp is of this temporary nature. As in *Reynolds* v. *Ashby & Son* (1) this clamp or small "L" pin is used to ensure steadiness of the machine while it is being operated. It is itself movable and temporary where used at all, and we have no information as to whether or not it is in position, where used, out of working hours. The leather belt connecting with the rotary shaft can also be detached in a moment, and there is not a nut or a bolt on the whole attachment except the wing-nut on the little clamp or pin, which itself is not permanently in position but has to be removed on each occasion when the machine has to be lifted out or turned over for inspection. In my opinion this is a much weaker case than that of *Lyon* v. *London City and Midland Bank* (2), where seats were attached in rows to iron standards and each standard was fastened to the floor by four screws passing through circular holes in the flange at the foot of the standard. In that case (also a mortgagee case) Joyce J. says at p. 139: "No doubt a chattel, on being attached to the soil or to a building, prima facie becomes a fixture, but the presumption may be rebutted by showing that the annexation is incomplete so that the chattel can be easily removed without injury to itself or to the premises to which it is attached, and that the annexation is merely for a temporary purpose and for the more complete enjoyment and use of the chattel as a chattel." In *Reynolds* v. *Ashby & Son* (1) this decision is expressly approved by the House of Lords.

In these circumstances, as Lord Lindley says in *Reynolds* v. *Ashby & Son* (1), at p. 474: "Having regard to the nature of the things fixed and the mode of fixing," I hold that the sewing machines No. 3 were in no sense fixtures by their attachments to No. 1 or to No. 2 or to either of them. It would defeat their useful purpose if they were fixtures in this sense, and I am satisfied that those who brought them there

(1) [1904] A. C. 466. (2) [1903] 2 K. B. 135.

never intended them to be fixtures. But if the sewing machine in this case is so insufficiently affixed to the admitted fixtures, it is still contended by the appellants that in law it is to be regarded as a fixture because it is a movable part of fixed machinery. This is by virtue of the decision in *Mathers* v. *Fraser* (1) and in *Ex parte Astbury* (2). But such movable part must be essential to the working of this machine.

Mr. Murphy has rightly drawn attention to the fact that in the trade the sewing machines are known as "machine heads." We have also evidence that sewing machines are sold separately, but this is a neutral fact on the issue whether or not they are to be considered as a separate part of a machine or as themselves separate machines.

The appellants do not contend that 1 and 2 and 3 are a machine, but rather a system of machinery. Let me examine the true position as it appears to me. 1 is a shaft; its object is to distribute power by frequent revolutions. Can one say that a sewing machine is an essential part of such machinery? I think not. If the power is applied, the shaft will perform its duty of revolving with equal or even greater rapidity if the sewing machine is removed. It remains equally efficient to supply power for a lathe if required to do so. No. 2, the bench, is there to carry the shaft underneath and to support the sewing machine above. It is there to carry on such duties whether the sewing machine is there or not. It would serve equally well to support sausage-making machines, and the tray could be altered if any tray were required. The sewing machine is not an essential part of the bench machinery. In my opinion there are three distinct machines in the present case working in combination, but this does not make any one of them an essential part of the others. The removal of the sewing machines would not injure or expose either 1 or 2 as was the case in *Pole Carew* v. *Western Counties, &c., Co.* (3). I hold, therefore, that the sewing machine is not an essential part of either 1 or 2, but is a distinct entity in itself; and it does not follow, because a sewing machine of this sort cannot be used without a bench or a power shaft, that it is an essential part of the machinery of either.

Finally, I think that there cannot be any doubt that these sewing machines were brought on to the premises by manufacturers for the purpose of trade and manufacture, and not for any intended benefit to the inheritance. If the case were one as between landlord and tenant they would clearly be trade fixtures. This does not bind the mortgagee (*Holland* v. *Hodgson* (4)), but on the facts of this case I draw a different inference of purpose to that drawn by Mathew L.J. in *Reynolds* v. *Ashby & Son* (5). The facts of this case are

(1) 2 K. & J. 536.
(2) L. R. 4 Ch. A. C. 630.
(3) [1920] 2 Ch. 97.
(4) L. R. 7 C. P. 328.
(5) [1903] 1 K. B., at p. 103.

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wholly unlike those in *D'Eyncourt* v. *Gregory* (1) and *Monti* v *Barnes* (2), where the pictures, panels, statuary in the first, and dog-grates in the second were brought in to increase the accommodation and amenities of the respective dwellings.

For these reasons I think the judgment of Wilson J. was right, and should be affirmed with costs.

Andrews L.J.:—

I do not conceal the fact that I have found this case one of great doubt and difficulty; and after a careful perusal of every relevant authority that I can trace, my mental attitude upon the question is precisely the same as that of Mr. Justice Wilson, who, in holding that these sewing machines were not fixtures, added that he could quite understand people differing in opinion in regard to the matter.

The question of "chattels" or "fixtures" has been referred to by many judges as one of fact, probably because they hoped in this way to reconcile apparently conflicting decisions. I prefer to call it a mixed question of law and fact, and to admit, with the candour of Lord Lindley in *Reynolds* v. *Ashby & Son* (3), that "I do not profess to be able to reconcile all the cases on fixtures, still less all that has been said about them."

The question arises in the present case as between those standing in the relation of mortgagor and mortgagees; and, however absurd it may appear that in the process of development of our law the old distinction, so clearly pointed out by Lord Cottenham in *Fisher* v. *Dixon* (4) should be retained, it is too late for judicial opinion to ignore the fact that as between mortgagor and mortgagee the old common law rule is rigidly adhered to, articles affixed to the freehold passing to the mortgagee as part of his security, whilst as between landlord and tenant the rule has been greatly relaxed in respect of trade and ornamental fixtures. If this distinction is now to be removed it must be by legislation.

What then are the underlying principles to which we must look in determining what are "fixtures" within the common law rule? Two matters must be considered. The first is the mode, the second is the object, of the annexation; and, as appears from the speech of Lord Macnaghten in *Leigh* v. *Taylor* (5), the trend of modern authority is undoubtedly to assign relatively less importance to the former than in earlier times. In referring to this case subsequently in *In re Sir Edward Hulse, Bart., Beattie* v. *Hulse* (6), Buckley J., at p. 411, in a passage which appears to me to interpret correctly the grounds of the decision, says that "the learned Lords treated the question

(1) L. R. 3 Eq. 382.
(2) [1901] 1 K. B. 205.
(3) [1904] A. C. 466.
(4) 12 Cl. & F. 312, at p. 328.
(5) [1902] A. C. 157, at p. 162.
(6) [1905] 1 Ch. 406.

as one to be determined not so much by an investigation of the physical means used for the attachment as of the purpose for which, and of the intention of the person by whom the chattels were attached." The two questions cannot, however, be wholly divorced from one another, as purpose or intention is not to be ascertained by an inquiry in each case into the motive of the person who annexed the chattel, but is rather to be inferred from all the circumstances of the case: per Vaughan Williams L.J. in *In re De Falbe, Ward* v. *Taylor* (1).

Let us then first consider the method of physical attachment employed in the case of these power-driven sewing machines. The attachments to the bench and shafting, both of which are admitted to be fixtures, appear to be threefold:—1. A round leather driving-belt from the friction clutch to a pulley on the sewing machine. This belt can be slipped in a moment, and is obviously not such an attachment as would convert a chattel into a fixture. 2. Hook or plug attachments screwed on the bench for each machine, with corresponding attachments on the machine which fit into the former and keep it in position. These attachments are sufficient to prevent lateral movement, but they do not prevent the machines being lifted directly upright, and they also serve as a sort of hinge to permit the machines to be turned by the operator for examination. 3. A small steel clamp, the head of which, about half an inch long, can be easily turned round over part of the base of the machine, to prevent its being lifted upright or tilted as might be done by an over-tight driving-belt, and also to minimize vibration. It is easily loosened or fastened in position, as may be desired, by means of a winged-nut screwed on the end of the stem underneath the bench, which can be moved by finger and thumb. The evidence is that these clamps are not universally provided as they are more a convenience than a necessity, and further, that when provided they are frequently not used. In my opinion these two latter attachments were the simplest that could be devised for the purpose of giving the necessary rigidity or fixity to the machines. Collectively, they prevented involuntary movement which might have interfered with the due and proper working of the machines, but they did not prevent the operator turning over or wholly removing his machine within the space of a few seconds any time he wished to do so, without the slightest injury to the sewing machines, the bench, or attachments.

From these facts the object of the attachments is, I think, clear. It was that these attachments should enable the sewing machines, which in themselves were mere chattels, to be more effectually used and enjoyed as chattels. There is no evidence, either in the nature of the attachments, their size or number, or any other circumstance connected with them, which would suggest the intention of an incorporation of the chattels with

(1) [1901] 1 Ch. 523, at p. 535.

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the freehold. The mere fact of some annexation of articles to freehold for their efficient use as chattels will not convert them into realty. There must be evidence from which the natural inference can be drawn that they were affixed for the better enjoyment of the freehold. *Horwish* v. *Symond* (1). There is no such evidence here. The incomplete character of the annexation shows that the intention was to attach the machines only temporarily. To have done otherwise would have been to interfere with the simple and effective user of the machines. They could have been removed either temporarily or permanently at any moment. If temporarily, they could have been subsequently restored to their positions, as they frequently were; if permanently, the benches, shafting, and power could have been utilized for similar machines, or they might have been adapted for use in connexion with other types of small machinery. The machines were intended to be accessory to the business of the factory just as in *Wake* v. *Hall* (2), the machinery and buildings were intended to be accessory to mining. In neither case is there to be found any intention to make them accessory to the soil, and, accordingly, they are not fixtures. The case is to my mind quite different from *Reynolds* v. *Ashby & Son* (3), where heavy steam-driven machinery, with power transmitted by shafts, wheels, and gearing was attached to specially prepared concrete beds by bolts and nuts.

For these reasons I am of opinion that the first branch of Mr. Murphy's argument, based on the character and quantum of annexation, fails. He has, however, very powerfully argued that, as these sewing machines, or "machine heads" as they are called by some of the witnesses, are part of an immovable stitching or sewing machine system, they must themselves, though readily removable, be treated as attached to the freehold and therefore fixtures. His proposition is that where part of a machine is immovable and a fixture, other parts, though movable, if necessary to the effective working of the whole must be regarded in law as fixtures. He has referred us to Fisher on Mortgages, where, in the 6th edition at p. 45, the proposition is thus stated: "Moreover, with any fixture will pass without special mention, whatever, though accidentally detached from it, or not of its own nature a fixture, may be essential for the proper employment of the machine or fixed article of which it forms part, even though it be more or less capable of use in a detached state." I do not quarrel with this statement of the law, the true meaning and application of which is to be found in the illustrations which follow. Thus, a millstone removed for repair: *Place* v. *Fagg* (4); or the anvil of a steam-hammer: *Metropolitan Counties Society* v. *Brown* (5); duplicate

(1) 110 L. T. 1016.
(2) 8 A. C. 195.
(3) [1904] A. C. 466.
(4) 7 L. J. (O. S.) K. B. 195.
(5) 26 Beav. 454.

iron rolls which had been fitted to and actually used in a machine: *Ex parte Astbury, In re Richards* (1); and leather driving-belts fastened from fixed wheels or drums to fixed machinery: *The Sheffield and South Yorkshire Permanent Benefit Building Society v. Harrison* (2), have been held to be fixtures. As Page Wood V.C. put it in *Mather* v. *Fraser* (3), adopting the observations of Baron Parke in *Place* v. *Fagg* and *Ashby* (4): "If the thing in question is an essential part of the machine, then, although movable . . . it is to be treated as belonging to the machine; and, if the machine itself is held to be a fixture, the movable part of it must be also so held."

I have come, however, to the clear conclusion that, whilst the principle of law for which Mr. Murphy contends is supported by high authority which cannot now be questioned, it is quite fallacious to apply it to the facts of the present case. It is an abuse of language to speak of these sewing machines or machine heads as part of one machine with the shafting and bench. They may all be parts of the same machinery system, but not of one machine. It would be as absurd to say that the whole sixty machine heads and all the shafting and bench constitute one single machine, as it would be to suggest that the shafting and bench are to be arbitrarily divided into sixty parts so that the whole with the machine heads form sixty separate machines. If the sewing machines were so permanently attached to the bench as to constitute them fixtures, each part of them, though easily severable, such as a thumb-screw, shuttle, or needle holder, would no doubt be a fixture, because all such parts would be essential portions of a fixed machine. The present case, in my opinion, resembles much more closely the case of *The British Economical Lamp Co., Ltd.*, v. *Empire Mile End, Ltd., and Another* (5), where electric filament lamps temporarily fixed in position with a view to their efficient use were held not to be fixtures though they formed an essential part of a complete system of electrical installation which, in all other respects was a fixture attached to the premises. The second branch of Mr. Murphy's argument therefore also fails.

The third and last argument which he addressed to us is also untenable. It is really an attempt to generalise from the special facts of *Monti* v. *Barnes* (6), where the mortgagor of a house subsequently to the mortgage removed the ordinary fixed grates and substituted dog-grates which were of considerable weight, but were not physically attached to the structure of the house in any way. It was held that the true inference to be drawn from these facts was that the mortgagor placed the dog-grates in the house with the object of improving the inheritance, and that they were therefore fixtures which passed to the mortgagee. This was a reasonable inference to draw,

(1) L. R. 4 Ch. A. C. 630.
(2) 15 Q. B. D. 358.
(3) 2 K. & J. 536, at p. 559.
(4) 4 Man. & Ry. (K. B.) 277.
(5) 29 T. L. R. 386.
(6) [1901] 1 K. B. 205.

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having regard to the substitution of new for old fixed grates which could not legally be moved to the prejudice of the mortgagee, and having regard also to the obvious fact that the mortgagor could not have intended that the house should be without grates. It is quite impossible to deduce from a case decided on such special facts any general proposition which would support the mortgagee's contention in the present case. On these grounds I agree that the appeal must be dismissed.

Solicitors for the appellants: *L'Estrange & Brett.*
Solicitor for the respondent: *Robert Wallace.*

J. M'C.

JEANIE W. SCOTT AND ELIZABETH M. SCOTT AND THOMAS M. SCOTT, INFANTS, BY THE SAID JEANIE W. SCOTT, THEIR NEXT FRIEND, PLAINTIFFS, *v.* ELLEN SCOTT AND JAMES B. SCOTT AND PROVINCIAL BANK OF IRELAND, LTD., DEFENDANTS.

M. R.
(I. F. S.)
1924.
May 8, 9, 27.

(1922. No. 137.)

Administratrix not administering estate—Continuing to carry on deceased's business without authority—Stocks and shares purchased by one of next-of-kin out of profits of business—Scrip deposited with bank as security—Bank not having notice of breach of trust—Other next-of-kin adopting the trading and seeking to follow assets—Claim which is a mere equity conflicting with an equitable estate — Priority of equitable estate — Equities not equal — Equitable mortgage made in breach of trust — Trustee and cestuis que trustent—Negligence of trustee—Whether loss falls on cestuis que trustent or on strangers.

T. S., who carried on two separate businesses, died intestate, and letters of administration were granted to his widow, E. S. E. S., instead of administering his estate, continued to carry on both businesses. Three years later E. S. appointed her eldest son, J. B. S., to manage one of the businesses, which was carried on under the name of T. S. & Co. For this purpose she used to sign blank cheques in the name of T. S. & Co., leaving them to be filled up by J. B. S. About eight years after the death of T. S., E. S. transferred her banking account to the defendant bank, where she opened an account in the name of T. S. & Co. J. B. S. also opened an account in his own name with this bank. J. B. S., instead of using the signed blank cheques for the purposes of the business, used them to pay for certain stocks and shares, which he had bought in his own name. In consequence of these purchases, the account of T. S. & Co. got into debit. J. B. S. also borrowed money from the bank to purchase a house. The bank having asked for security, J. B. S. deposited with them the scrip of the shares and the lease of the house. The bank was unaware that the business of T. S. & Co. had been that of T. S., and that E. S. was carrying it on as his administratrix.

An action having been brought by the younger children of T. S. against E. S., J. B. S., and the bank to administer the estate of T. S., and claiming the shares pledged to the bank as assets of T. S.:

Held, that the plaintiffs having elected to adopt the trading that had been carried on, were seeking to follow the assets into property which had come to represent those assets, but that this was a mere equity, and not an equitable estate, which involves a definite lien, charge, or claim on definite property. Accordingly, in a contest of priorities, the plaintiffs' claim could not prevail against an equitable estate such as the bank had, i.e., an equitable mortgage on specific items of property. Accordingly the title of the bank to the securities was held to be good.

Decision of the Court of Appeal in *In re Ffrench's Estate*, 21 L.R. Ir. 283, held by the Master of the Rolls to be binding on him, though he was of opinion that it was at variance with the decision of the House of Lords in *Shropshire Union Railways and Canal Co.* v. *The Queen*, L.R. 7 H.L. 496.

Shropshire Union Railways and Canal Co. v. *The Queen*, L.R. 7 H.L. 496, is a clear authority that, as between two claimants, each having only an equitable interest, the first in point of time cannot be prejudiced by the fact that it was a breach of trust by his trustee which occasioned the dealing with the second in point of time.

ADMINISTRATION ACTION.

Thomas Scott, who died intestate on the 16th day of December, 1910, carried on, in his own name, the business of furniture dealer, cabinet maker, and upholsterer, at No. 26 Upper Liffey

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Street, Dublin, and that of grocer in Seapoint, Co. Dublin. He was also possessed at the time of his death of stock-in-trade, furniture, money in bank, book debts, and other personal effects. Letters of administration were granted to his widow, Ellen Scott. In addition to his widow, he left surviving him four children, viz. James B. Scott, his eldest son (who was one of the defendants), and Jeanie W. Scott, Elizabeth M. Scott, and Thomas M. Scott (who were the plaintiffs). These constituted the statutory next-of-kin. After the death of her husband, Ellen Scott carried on both businesses, and personally managed and supervised them down to the year 1913, when she appointed her son, James B. Scott, manager of the Dublin business, which was carried on under the name of Thomas Scott & Co., and she continued to manage the Seapoint business herself. For the purpose of carrying on the business of Thomas Scott & Co., Ellen Scott used to sign blank cheques, and give them to her son, James B. Scott, to fill in, to be used as required for the purposes of the business. About eight years after her husband's death, Ellen Scott changed her bankers, transferring her banking business to the Provincial Bank of Ireland, and opening an account with that bank in the name of Thomas Scott & Co. James B. Scott, instead of using the blank cheques signed by Ellen Scott for the purposes of the business, used them for the purchase of stocks and shares, which he bought in his own name. In consequence of this, the banking account got into debit, and the bank asked for security. James B. Scott then deposited with the bank the scrip of certain of the shares. He had also opened an account in his own name with the bank, in order to get an advance to purchase a house, which advance was to be secured by a deposit of the lease, and was further secured by a deposit of the scrip of certain other shares, which also stood in his own name. There was due to the bank on this account the sum of £1,150. Finally the bank refused further credit, and Ellen Scott was unable to meet the liabilities of the business of Thomas Scott & Co. James B. Scott continued to act as manager of the Dublin business down to January, 1922, when Ellen Scott removed him from that position.

This action was then instituted by the three younger children, namely, Jeanie W. Scott, Elizabeth M. Scott, and Thomas M. Scott, the latter two being infants (suing by the said Jeanie W. Scott, their next friend), against Ellen Scott, James B. Scott, and the Provincial Bank of Ireland. The plaintiffs sought to have the personal estate of Thomas Scott administered under the direction of the Court, and for an account of all dealings and transactions by the defendants with reference to the business of furniture dealer carried on at 26 Upper Liffey Street, Dublin, and of grocer carried on at Seapoint, Monkstown, and for an account of the assets of and money derived from such businesses, which were carried on by the defendants, Ellen Scott and James B. Scott, without authority since the death of the said Thomas Scott; an inquiry as to what stocks, securities, and

properties were bought with funds derived from such business by the defendants, or any of them, or had come to their hands; and to have the defendants, James B. Scott and the Provincial Bank, declared trustees of the personal estate of Thomas Scott, deceased, and the persons entitled thereto, and of all funds and securities purchased with moneys derived from such businesses. The defendant, Ellen Scott, was sued as administratrix, and also in her personal capacity.

It was alleged by the plaintiffs that, prior to his removal, James B. Scott managed the business in an unsatisfactory manner; failed to account for moneys received by him as manager; incurred heavy debts in connexion with the business; converted to his own use portion of the stock-in-trade and moneys received by him; invested moneys received by him as manager in the purchase, in his own name, of stocks, shares, and securities, and deposited the share certificates and other documents of title with the bank in order to secure a private debt of his own to the bank, and also as security for moneys advanced by the bank to him as manager and agent for Ellen Scott.

The bank denied that any money was advanced by them to James B. Scott otherwise than in his private capacity as an ordinary customer. On December 7, 1920, they stated, he opened an account with them for the purpose (inter alia) of obtaining an advance to enable him to complete the purchase of certain premises for a private residence for himself. In order to secure the advance, he deposited with them the said share certificates. The bank also stated that the advance was made in the bona fide belief that the certificates and securities belonged to James B. Scott, and that they had no notice whatsoever of any facts or matters that made it reasonable to inquire into his title to make such deposit.

Meredith K.C. (with him *Poole*), for plaintiffs:—

All shares bought with cheques of Thomas Scott & Co. are assets of deceased, and can be followed by the next-of-kin. The bank, in taking an equitable deposit in May, 1920, and January, 1921, were under a duty to inquire into the title, and must be deemed to have had notice that the shares were bought with assets. The title of the bank not having been perfected by legal transfer and registration, the bank, even if they had no notice, took subject to equities. The equity of the next-of-kin cannot be displaced by a mere equitable transfer. [They cited: *Shropshire Union Railways and Canal Co.* v. *The Queen* (1); *Moore* v. *North-Western Bank* (2); *Société Générale de Paris* v. *Walker* (3); *Ireland* v. *Hart* (4); *In re Hallett's Estate, Knatchbull* v. *Hallett* (5); *Irish Land Commission* v. *Davies* (6).]

(1) L. R. 7 H. L. 496.
(2) [1891] 2 Ch. 599.
(3) 11 A. C. 20.
(4) [1902] 1 Ch. 522.
(5) 13 Ch. D. 696.
(6) 27 L. R. Ir. 334.

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Garrett Walker K.C. (with him *Phelps*), for the defendants, the Provincial Bank of Ireland:—

There was no obligation on the bank to make any further inquiries. The plaintiffs had not any equitable interest in the funds; they merely had an equity. There is a clear distinction recognised between an equitable interest and an equity. The plaintiffs could not rely on priority of time, because they were only volunteers; whereas the bank were purchasers for valuable consideration. There was no clear trust fund and no clear trustees. So far as the bearer bonds were concerned, they passed by delivery. A negotiable instrument gives a good title to anyone honestly acquiring it. The beneficiaries are bound by the acts of the administratrix as if she were a trustee. [They cited: *Hone* v. *Boyle, Low, Murray, & Co.* (1); *London Joint Stock Bank* v. *Simmons* (2); *Rice* v. *Rice* (3); *In re Ffrench's Estate* (4); *In re Sloane's Estate* (5); *Cave* v. *Cave* (6); *Bank of Ireland* v. *Cogry Flax Spinning Co.* (7).]

O'CONNOR M.R.:—

This action was brought for the administration of the personal estate of Thomas Scott, deceased, who died intestate. The plaintiffs are three of his children. The defendants are Ellen Scott (his widow), James B. Scott (another child), and the Provincial Bank of Ireland. The last-named was made a party on account of certain stocks and shares held by the bank as equitable mortgagees, and claimed by the plaintiffs as personal estate of the deceased.

Thomas Scott died on the 16th December, 1910. He carried on two businesses—one in Upper Liffey Street, Dublin, under the name of Thomas Scott & Co., and the other at Seapoint, under the name of Scott & Co. Ellen Scott, his widow, obtained a grant of administration to his estate on the 8th May, 1911, and, instead of realizing her husband's estate and administering it in the ordinary course, she, no doubt with the best intentions, assumed her deceased husband's position, and carried on both businesses and supported her family thereout. The defendant, James B. Scott, is her eldest child, and when he had had some business training she employed him as the manager of the business carried on under the name of Thomas Scott & Co. She retained the management of the business of Scott & Co. in her own hands. She seems to have had unbounded confidence in her son's capacity and integrity, because she adopted the very foolish system of signing blank cheques in the name of Thomas Scott & Co., to be filled up by him for payment of the necessary outgoings. For about eight years from the death of her husband Ellen Scott

(1) 27 L. R. Ir. 137.
(2) [1892] A. C. 201.
(3) 2 Drew. 73.
(4) 21 L. R. Ir. 283.
(5) [1895] 1 I. R. 146.
(6) 15 Ch. D. 639.
(7) [1900] 1 I. R. 219.

kept her banking account with a bank at Blackrock. On the 15th February, 1918, she transferred her banking business in connexion with the business of Thomas Scott & Co. to the office of the Provincial Bank in St. Stephen's Green, Dublin, and there opened an account in the name of Thomas Scott & Co. It was alleged that when that account was opened the manager of the bank knew that the business had been formerly carried on by Thomas Scott, deceased, and that it was continued by Ellen Scott as his administratrix; but I am satisfied by the evidence which was given by the bank manager that he had no such knowledge, and knew nothing more than that the business of Thomas Scott & Co. was being carried on by Ellen Scott, and presumably as the owner thereof. The bank manager also knew that James B. Scott was the manager of the business.

For a time all went well. The account was in credit; but at the end of the year 1920 there was a debit balance of £546 5s. 9d., and at the end of the year 1921 that had been increased to £1,103 5s. 4d. This is to be accounted for by the fact that cheques signed by Ellen Scott in the name of Thomas Scott & Co., with blanks for the amounts and the names of the payees, were used by James B. Scott for paying stockbrokers the prices of stocks and shares of a speculative character, which he had purchased in his own name. When the banking account of Thomas Scott & Co. got into debit the bank asked for security, and James B. Scott deposited with the bank the scrip of certain shares in rubber companies which stood in his name. James B. Scott also opened an account in his own name with the bank. He did so for the purpose of getting an advance for the purchase of a house, for which he was to pay £1,240, which was to be secured to the bank by a deposit of the lease thereof. He further secured this account by a deposit of the scrip of certain other shares which stood in his own name. There is a sum of about £1,150 due to the bank on that account. It is clear that all the several shares which were pledged with the bank represented moneys drawn from the account of Thomas Scott & Co. In the end, further credit was refused by the bank, and Ellen Scott found herself unable to pay the liabilities of the business of Thomas Scott & Co. This, no doubt, came as a surprise to her. She thought that her cheques were honestly applied for the payment of the current liabilities of the business. Instead of that, they went to brokers on the London and Dublin Stock Exchanges. The creditors threatened to sue her, and she apprehended that on getting judgment against her they would seize the stock-in-trade of both businesses. In these circumstances the children were advised that the businesses and all the stock-in-trade belonging thereto were assets of their father, and that they should have the estate administered by the Court, and so protected against their mother's creditors. They were also advised that the several stocks and shares which were pledged to the bank were assets of their father, and that the claim of the bank thereto

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could not prevail against their prior equitable title. It was for the purpose of trying this latter question that the bank was made a defendant; and as at this stage this is the only question which has to be determined, I will deal exclusively with it. I conceive that during the progress of the action other questions will arise as between Ellen Scott and the plaintiffs, and between all the next-of-kin and the unsecured creditors of Ellen Scott.

The case which is made by the plaintiffs is that, as the shares were purchased by moneys which in equity were assets of Thomas Scott, the shares themselves became assets, and may be claimed as such by the next-of-kin; that James B. Scott had no right to pledge them to the bank; and that, as the bank's title is only an equitable title, it is subject to the prior title of the next-of-kin. This claim is supported by the old principle that every equitable conveyance is an innocent conveyance, and that, as between equities which in all other respects are equal, the first in time must prevail. The defence of the bank is that the equities are not equal, that the bank has the better equity, and, further, that the contest is not between two equitable estates, but between an equitable estate properly so called vested in the bank and a mere equity, which only gave the plaintiff a right of action.

I will first go into the question whether the equities are equal. It is not alleged against the plaintiffs that they were guilty of any negligence, laches, or acquiescence which facilitated the breach of trust which was committed. On the other hand, it was alleged, and truly alleged, by the bank, that they had no notice of the breach of trust, and that for valuable consideration they dealt in the ordinary course of business with Thomas Scott & Co., Ellen Scott, and James B. Scott. I must say that in such a case, treating it in this simple way, it is very difficult to say who has the better equity. But the bank say that there is a further element to be considered, and it is this: Ellen Scott was the plaintiffs' trustee, and it was owing to her negligence and course of dealing that James B. Scott was enabled to deal with the moneys of the business of Thomas Scott & Co. in the way he did, and that the next-of-kin are bound by his acts. The law on this part of the case stands in a very peculiar way. Mr. Meredith, for the plaintiffs, relied on *Shropshire Union Railways and Canal Company* v. *The Queen* (1), a case of the very highest authority, being a decision of the House of Lords, presided over by Lord Cairns. The facts of that case are simple. The railway company's banker, Holyoake, held in his own name certain shares in the company upon trust for the company, and he was allowed to be the custodian of the scrip. In breach of his trust, he borrowed money from one, Robson, on the security of a deposit of the scrip, undertaking, on request, to execute a legal mortgage. Robson died. His widow became his executrix. She gave notice to the company of her

(1) L. R. 7 H. L. 496.

claim, which the company disputed. She afterwards procured a legal transfer of the shares from Holyoake, which the company refused to register. The executrix applied for a mandamus to compel the company to register the transfer. This raised the question whether the equity of the company, which was first in time, should prevail over the subsequent equity of Robson. On this Lord Cairns says (at p. 505): "It was perfectly legitimate that these defendants should own the stock. It is perfectly in accordance with law that they should have had that stock, which they could not hold in their own names, standing for them in the name of a trustee or in the names of trustees, and in that state of things undoubtedly the position of matters was that the defendants had the whole beneficial interest in the stock belonging to and forming part of the property of the company. Theirs was the equitable title. Holyoake was a person who held merely the legal title and the right to transfer the stock. He was able, if not interfered with, to transfer the stock to any other person, and to give a valid receipt for the purchase-money to any person who had not notice of the beneficial interest of the defendants. On the other hand, any person with whom Holyoake might deal by virtue of his title upon the register, had, or ought to have had, these considerations present to his mind. He ought to have known that although Holyoake's name appeared upon the register as the owner of these shares, and although Holyoake could present to him the certificates of this ownership, still it was perfectly possible either that these shares were the beneficial property of Holyoake himself, or that they were the property of some other person. If he dealt merely by equitable transfer, or equitable assignment with Holyoake, and if it turned out that the beneficial ownership of Holyoake was co-incident and co-extensive with his legal title, well and good; his right would be accordingly, so far as Holyoake was concerned, complete. But if, on the other hand, it should turn out that Holyoake's beneficial interest was either nil, or was not co-extensive with the whole of his apparent legal title, then I say any person dealing with Holyoake, by way of equitable bargain or contract, should have known that he could only obtain a title which was imperfect, and would not bind the real beneficial owner. And, my Lords, he also might have known, and should have known, this, that if he desired to perfect his title, and make it entirely secure, he had the most simple means open to him—he had only to take Holyoake at his word. If Holyoake represented that he was the real owner of these shares, the proposed transferee had only to go with Holyoake, or to go with the authority of Holyoake in his possession, to the company, and to require a transfer of those shares from the name of Holyoake into his own name. If he had obtained that transfer, and the company had made it, no question could have arisen, and no litigation could subsequently have taken place.

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"That being the state of things, your Lordships have, on the one hand, the directors, clearly the equitable owners of the stock in question. You have, on the other hand, Mr. Robson, the person dealing with Mr. Holyoake for an equitable charge, having in his power, if he was so minded, to obtain a perfectly valid legal charge, which would have made his title complete. Your Lordships have to deal with a case of a pre-existing and undoubtedly equitable title, and circumstances which are alleged to have defeated and to have taken away that pre-existing equitable title. My Lords, that pre-existing equitable title may be defeated by a supervening legal title obtained by transfer. And I agree with what has been contended, that it may also be defeated by conduct, by representations, by misstatements of a character which would operate and enure to forfeit and to take away the pre-existing equitable title. But I conceive it to be clear and undoubted law, and law the enforcement of which is required for the safety of mankind, that, in order to take away any pre-existing admitted equitable title, that which is relied upon for such a purpose must be shown and proved by those upon whom the burden to show and prove it lies, and that it must amount to something tangible and distinct, something which can have the grave and strong effect to accomplish the purpose for which it is said to have been produced.

"I have anxiously striven to understand what were the circumstances or what was the line of conduct which is said in this case to operate to defeat the admitted equitable title, and I have been able to discover only four matters which are stated either separately or all together to have produced that effect.

"My lords, in the first place, the arguments at your Lordships' Bar on behalf of the respondent appeared to me to go almost to this, that whenever you have an equitable owner who is the absolute owner, that is to say, entitled to the whole equitable interest, such a person ought not to have a trustee at all holding the indicia of legal ownership; or, if he chooses, for his own purpose, to have such a trustee, he must be in danger of suffering for every act of improper conduct by that trustee; and that, therefore, if the person entitled absolutely to the equitable interest in a share in a railway company, chooses for his own purpose to have that share standing in the name of a trustee for him, he will be bound not merely by a valid legal transfer of that share by the trustee, but by any equitable dealing or contract which the trustee may choose to enter into. My Lords, that is a very serious proposition. It goes not merely to shares, but it goes to land, and to every other species of property; and it goes to say that, whereas there is a large, well-known, recognised, and admitted system of trusts in this country, that system of trusts is to be cut down and moulded and reduced to this, that it is to be

a system applicable only to infants, married women, or persons with limited interests; and that wherever the limited interest has ceased, and the equitable interest has become entire and complete without any limit, there the equitable owner is under some measure of obligation with regard to his duty of watching his trustee, an obligation which does not lie upon a limited owner. I find no authority for such a proposition, and I feel satisfied that your Lordships will not be disposed to introduce, for the first time, that as a rule of law."

It appears to me that as between two claimants, each having only an equitable interest, this is a clear authority that the first in point of time cannot be prejudiced by the fact that it was a breach of trust by his trustee which occasioned the dealing with the second in point of time.

But, as I said, the law stands in a peculiar way. The judgments of the Court of Appeal in Ireland are directly at variance with the judgment of the House of Lords.

In *In re Ffrench's Estate* (1), where there was a contest between cestuis que trustent, who asserted their prior equity against a subsequent equity which arose out of a breach of trust committed by the trustees, FitzGibbon L.J. said (2): "I think that where cestuis que trustent are represented by trustees, and are acting, or must claim, through trustees in whom the legal estate is or ought to be vested, and where innocent and independent third parties have been misled or defrauded by the conduct, or through the laches, of those trustees, such cestuis que trustent cannot be better off, in equity, than if they had been sui juris, and had themselves acted as their trustees did."

In the same case Barry L.J. said (3): "It is the duty of such persons to select careful and honest trustees, and if they fail in that duty, and select those who are careless or dishonest, and either the children or innocent strangers must be defrauded by the acts of such trustees, the loss should fall on those whose agents chose the faulty trustees rather than on the strangers, assuming, of course, the latter to be guilty of no negligence or default."

These statements of the law were reaffirmed by Porter M.R. in the *Bank of Ireland* v. *Cogry Flax Spinning Co.* (4).

I cannot reconcile these judgments with Lord Cairns's judgment in the *Shropshire Union Railways and Canal Co.* v. *The Queen* (5) because, there the equitable mortgage was made by the company's trustee in breach of his trust and, notwithstanding that, it was held that the company, the cestui que trust, had priority. In other words, the loss fell on the stranger and not on the party who actually appointed the delinquent trustee.

(1) 21 L. R. Ir. 283.
(2) At p. 319.
(3) At p. 337.
(4) [1900] 1 I. R. 219.
(5) L. R. 7 H. L. 496.

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Cases of the same character with the same result were *Moore* v. *North-Western Bank* (1) and *Ireland* v. *Harte* (2). In each of these cases the stranger was allowed to suffer by the fraudulent conduct of a trustee. It is strange that the *Shropshire Union Case* (3) was not referred to in either *In re Ffrench's Estate* (4) or in *Bank of Ireland* v. *Cogry Flax Spinning Co.* (5). Mr. Meredith would possibly explain this by saying that equities against choses in action and equities against real estate must be dealt with quite apart, and that the same principles do not apply. I cannot accept this because the principles enunciated in both the English and Irish cases are broad equitable principles which must affect every class of property. It is obvious that in the conflict of authorities I must accept the law as laid down by the Irish Court of Appeal, although I have a suspicion that it conflicts with the fundamental principle that every equitable conveyance must be an innocent conveyance.

It is, however, to be remarked that in *In re Ffrench's Estate* (4) the party Tyrrell, whose later equity was held to be the superior equity, had done everything he could have done to perfect his title; whereas in the present case the Provincial Bank could have, without any difficulty, acquired the legal ownership of the shares whose scrip was deposited. One of the elements in *In re Ffrench's Estate* (4) was that the claimants, who were prior in point of time, had not an equitable estate, but only what is called a mere equity, while the claimants, in respect of the later equity, had a definite equitable estate—that is, a mortgage upon an equity of redemption. Let us see how this bears upon the present case. It was the duty of the defendant, Ellen Scott, as soon as she had obtained a grant of administration to her husband, or at least within a reasonable time afterwards, to realize his assets. She had no right to continue to trade with them. She did continue to trade, and was, therefore, guilty of a continuing breach of trust. Now what were the rights in these circumstances of the next-of-kin? Any one of them could have commenced an action against her and could have made her liable for the full value of the assets which she had illegally dealt with, together with interest at the rate of 5 per cent. thereon, or, at his election, he could have adopted the trading and made her account for all her trade dealings. These were the alternative equities, either of which could have been asserted. The latter alternative has been adopted which, no doubt, means following the assets of the intestate into property which has come to represent them. But this is a mere equity—it is not an equitable estate, which involves a definite lien, charge, or

(1) [1891] 2 Ch. 599.
(2) [1902] 1 Ch. 522.
(3) L. R. 7 H. L. 496.
(4) 21 L. R. Ir. 283.
(5) [1900] 1 I. R. 219.

claim on a definite item of property. It is not like a vendor's lien for unpaid purchase-money, or an equitable mortgage of specific property, or a claim by a cestui que trust arising out of a trust of specific property. It is rather a right of action, the assertion of which may result in the capture of property for a particular trust. It is well settled that in a contest of priorities such a claim cannot prevail against an equitable estate, such as the bank has in the present case—that is, an equitable mortgage on specific items of property. There is another element in this case which must be taken into account in weighing the equity of the next-of-kin against that of the bank. The overdraft of Thos. Scott & Co. on the bank account was brought about to a very great extent, if not entirely, by overdrafts which went in payment for the several securities which were pledged to the bank. I think that the securities in the main represent advances by the bank to Ellen Scott, and the proceeds of the sale of these securities will go in reduction of the overdraft and in relief of the estate. The overdraft must for the purposes of the plaintiffs' claim be regarded as a liability of Thomas Scott, deceased. If it is to be regarded as the personal liability of Ellen Scott, the stocks and shares so far as purchased with advances are not assets at all, because they would then have been purchased by Ellen Scott by moneys borrowed on her own personal security. It is not necessary, however, to go particularly into this, because on the other ground mentioned I am of opinion that the title of the bank to the securities is good.

I must now see what exactly should be the terms of the judgment. In the first place, there must be the usual order for administration, with the usual inquiries. Then there must be an inquiry into the trade dealings of the defendant, Ellen Scott, with the assets of the defendant. This will be a trading account. There will be no account against her under the heading of wilful default—wilful default has not been alleged. True, the defendant has been charged with breach of trust in trading, but the trading has been adopted. There must also be a declaration that the defendant, James B. Scott, is bound to account for all moneys belonging to the business of Thos. Scott & Co. which he invested in the purchase of stocks and shares in his own name, and there must be an account taken of such moneys and of the loss occasioned to the business by such purchases as aforesaid. There must also be a declaration that his share, as one of the next-of-kin, is bound to indemnify the estate against all such losses.

There will be a declaration that the Provincial Bank, by virtue of the deposit of the certificate of shares mentioned in the letter of deposit dated 6th May, 1920, became entitled to a good equitable mortgage on such shares and securities in respect of the balance due to the bank on foot of the account of Thomas Scott & Co. There will be a further declaration

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that the Provincial Bank, by virtue of the deposit of the certificate of shares mentioned in the letter of Robert Nicol to Hume Robertson, dated 7th December, 1920, became entitled to a good equitable mortgage on such shares and securities in respect of the balance due to the bank on foot of the account of James B. Scott; and a further declaration that all moneys due to the bank on such account are, as between the defendant, Ellen Scott, as administratrix of Thomas Scott, and the said James B. Scott primarily chargeable on the estate and interest of James B. Scott in the premises No. 28 Sandymount Avenue, Sandymount, the lease of which was deposited with the bank as further security for the balance due on the account of the said James B. Scott. There will be a further declaration that, subject to the said equitable mortgage, the several stocks and shares are assets of Thomas Scott, deceased.

I can decide nothing at present about the incidence of the trade debts contracted by the defendant, Ellen Scott. Questions as to this must arise in the course of the action. No doubt the creditors will furnish their claims, and when they do further questions will arise. I will declare the bank entitled to their costs of this action up to and including this hearing with their demand, and that, in so far as the securities held by the bank are insufficient to meet the said demand, such costs are payable out of the assets of the deceased. I will order the defendant, James B. Scott, to pay the plaintiffs' costs up to and including this hearing. I will reserve all other costs, and adjourn for further consideration.

Solicitors for the plaintiffs: *E. & G. Stapleton.*
Solicitor for the Provincial Bank: *John Tweedy.*

R. R.

ESTATE OF HENRY ERNEST WILLIAM FETHERSTONHAUGH-WHITNEY AND THE TRUSTS OF THE WILL AND CODICILS OF ELIZABETH WESTBY (1).

Appeal. (*I. F. S.*) 1924.

May 13, 26.

Will — Construction — Real Estate — Personalty — Separate dispositions — "Residuary legatee" — Residuary clause — Whether effective to carry real estate—Meaning of the word "property."

A testatrix devised real estate to T. F. for life, with successive estates tail to his sons, charged with certain annuities and jointures, and with an ultimate remainder to the use of T. F., his heirs, and assigns for ever. She then disposed of her personal estate, out of which she directed debts and legacies to be paid. Her will concluded: "I leave all the residue and remainder of my property after payment of my debts, legacies, and funeral and testamentary expenses" to T.F. and M.W., and she appointed them residuary legatees and executors. By a codicil she appointed A. F. and W.M. her executors and residuary legatees in the place of T.F. and M.W.

T. F. died in the lifetime of the testatrix, and upon the death without issue of H.W., one of the devisees to whom a life estate was limited by the will, all the successive estates tail had been exhausted. The question then arose as to whether the provision in the codicil appointing A.F. and W.M. executors and residuary legatees in the place of T.F. and M.W. was sufficient to carry the real estate left undisposed of by the will:

Held by the Court of Appeal (Molony L.C.J. and O'Connor L.J.; Ronan L.J. dissentiente), reversing Wylie J., that the residuary clause in the will did not carry the real estate, inasmuch as (1) the will showed a clear division between real and personal property, and made a complete disposition of each, and used appropriate words exclusively for the gifts of each; (2) testatrix had no real estate other than that of which the will contained complete dispositions under which T. F., if he survived testatrix, would, on failure of the previous estates, become absolutely entitled in fee to the whole; whereas, if the residuary clause carried the real estate he would only have been entitled to a moiety; and (3) the will showed that the word "property" in the residuary clause was limited by its context to personal estate by reason, amongst other things, of the facts that the annuities were charged only on the real estate, and that the debts and legacies were specifically declared in the first instance to be payable out of the personal estate, and that the residue referred to the residuary clause was, not the property charged with the annuities, but the property which remained after payment of the debts and legacies, i.e., personal estate, upon which these were specifically charged. Accordingly, the appointment of A.F. and W.M. residuary legatees in the codicil in the place of T.F. and M.W. did not carry the undisposed of realty.

APPEAL from an order made by Wylie J.

The appeal was brought by Adeline Margaret Fetherston from an order made by Wylie J. on March 18th, 1924, which declared that upon the true construction of the will and codicils of Elizabeth Westby, who died on August 16th, 1856, and in the events which had happened, the testatrix devised the ultimate remainder in her moiety of lands known as Newpass estate to Anne Fetherston, wife of Rev. Thomas Fetherston, and William

(1) In the Court of Appeal, before MOLONY L.C.J., and RONAN and O'CONNOR L.JJ.

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Westby Moore. The appellant asked for an order that the Public Trustee be directed to transfer to her the several stocks and securities representing the proceeds of the sale of a moiety of the Newpass estate.

The appellant's claim was that she was entitled to the capital moneys in the hands of the Public Trustee, representing one undivided moiety of the Newpass estate, County Westmeath, sold under the Land Purchase Acts by Henry Ernest William Fetherston-Whitney, tenant for life under the uses of the will and codicils of Elizabeth Westby, widow, who died on August 16, 1856.

By her will, dated June 12th, 1846, the testatrix devised the Newpass estate, subject to certain annuities and rent charges, to Nicholas Westby and John Sheppy Ribton upon the trusts and uses therein declared. These trusts and uses were as follows:—To her nephew, Rev. Thomas Fetherston, during his life with remainder to the use of Edmund Whitney Fetherston, the second son of Thomas Fetherston during his life with remainder to the first and other sons of Edmund Whitney Fetherston successively in tail male with remainders over in favour of other sons of Thomas Fetherston, and the issue male of such sons respectively for like estates, a life estate being limited to each such son with remainder after his death to his first and other sons in tail male with remainders in tail male to any sons of Thomas Fetherston born after the death of the testatrix, and with an ultimate remainder to the use of Thomas Fetherston, his heirs, and assigns for ever.

Power was given to each tenant for life to create a jointure of £200 a year for any woman whom he might marry. The testatrix charged the lands with the payment of the following annuities:—to her step-daughter, Mary Westby, £50; to her man-servant, Richard Major, £12; to her grand-nephew, Thomas John Fetherston, eldest son of Rev. Thomas Fetherston, £100 for life or until he should inherit and come into possession of the title and estates of his grand-father, Sir Thomas Fetherston, Baronet, deceased.

The testatrix next devised the Derryleagh estate, County Cavan, to the same trustees for the same beneficiaries and their issue, but in a different order. The ultimate gift was again to the use of Rev. Thomas Fetherston, his heirs, and assigns for ever.

Having directed that her debts and several pecuniary legacies, including one to her step-daughter, Mary Westby, should be paid out of her personal estate, the testatrix concluded her will as follows:—"I leave all the residue and remainder of my property after payment of my debts, legacies, and funeral and testamentary expenses to the said Thomas Fetherston and my step-daughter, Mary Westby, to be equally divided between them, share and share alike, and I appoint them my residuary legatees and executor and executrix of this my will."

On December 14th, 1852, the testatrix made a codicil to her will containing the passage following:—"Forasmuch as by my said will I appointed the Rev. Thomas Fetherston and Mary Westby executor and executrix of my said will and also residuary legatees, but finding that the Rev. Thomas Fetherston is in delicate health and that the said Mary Westby is unwilling to undertake the burden of the execution thereof and is also unwilling to be a residuary legatee, I now nominate, constitute and appoint Anne or Nannie Fetherston, now of Rugby, and wife of the said Rev. Thomas Fetherston, and William Westby Moore, of Upper Fitzwilliam Street, in the City of Dublin, and of 'Hermitage,' Rathfarnham, in the County of Dublin, Barrister-at-Law, my executrix and executor and also my residuary legatees and in the place and stead of the said Rev. Thomas Fetherston and Mary Westby."

The testatrix made three other codicils. She died on August 16th, 1856, and the will and four codicils were proved on September 11th, 1856, by Anne Fetherston and William Westby Moore, the executrix and executor nominated in the first codicil.

Rev. Thomas Fetherston succeeded to the title and dignity of Baronet, and died on August 28th, 1853, in the lifetime of the testatrix. Mary Westby also died in the lifetime of the testatrix in the month of February, 1854.

At the date of the death of the testatrix Sir Thomas John Fetherston (5th Baronet), who was the first son of Rev. Sir Thomas Fetherston, was her heir-at-law, and at the same time the testatrix was seized as purchaser of an estate of inheritance in fee-simple in one undivided moiety of the Newpass estate.

Henry Ernest William Fetherston-Whitney, the vendor in this matter, who was the youngest son of Rev. Sir Thomas Fetherston, and one of the devisees to whom a life estate in the testatrix's moiety of the Newpass estate was limited by her will, died without leaving issue on September 21st, 1921, and at his death all the uses or estates limited in the said moiety which preceded the remainder thereby limited to Rev. Thomas Fetherston, had failed or determined.

Adeline Margaret Fetherston claimed as the heiress-at-law of the testatrix. George C. Phillimore, the Earl of Harrowby, and W. E. Drax claimed under William Westby Moore.

The questions submitted for decision were:—

1. On the true construction of the said will and codicils and in the events which happened, did the testatrix devise the ultimate remainder in her moiety of the Newpass estate to the said Anne Fetherston and William Westby Moore, or die without having disposed of such ultimate remainder?

2. In case it shall be held that the testatrix devised the said ultimate remainder to the said Anne Fetherston and William Westby Moore, did they take under the said devise as joint tenants or as tenants in common?

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Mr. Justice Wylie held that the testatrix devised her moiety in the Newpass estate to Anne Fetherston and William Westby Moore; and in regard to the second question he made no decision. From this order Adeline Margaret Fetherston appealed.

Jellett K.C., Conner K.C. (with them *Cole Bowen*), for the appellant:—

The reference to debts, legacies, funeral, and testamentary expenses in the residuary clause limits the application of the term "property" to personal estate. The term "residuary legatee" must be fashioned and moulded by the context of the will, and here it must mean the person taking the residue of the personal property, as the will makes a division between real and personal property: *Singleton* v. *Tomlinson* (1). [Other authorities cited: *Hillas* v. *Hillas* (2); *Cooney* v. *Nicholls* (3); *In re Morris, Morris* v. *Atherden* (4).]

Garrett Walker K.C., Overend K.C. (with them *Phelps*), for the respondents:—

We submit that the word "property" includes real as well as personal estate, and that "leave" is a neutral expression. [They referred to *Loftus* v. *Stoney* (5); *Jones* v. *Skinner* (6); *Hughes* v. *Pritchard* (7); *Casey* v. *Lalor* (8).]

May 26.

MOLONY C.J.:—

On the 26th September, 1923, an application was made to the Irish Land Commission on behalf of Adeline Margaret Fetherston for the transfer to her by the Public Trustee of certain funds representing the balance of the purchase-money of one undivided moiety of the lands known as the "Derryleagh Estate," and also the redemption price of a perpetual yearly rent of £14, Irish currency, and the balance of the purchase-money of one undivided moiety of the lands known as the "Newpass Estate," of all of which Henry Ernest William Fetherston-Whitney was tenant for life under the limitations of the will and codicils of Elizabeth Westby, deceased.

Adeline Margaret Fetherston claimed that, in the events which have happened, there was an intestacy as regards these funds, and that she was entitled as heiress-at-law of the deceased.

The Judge referred the matter to the Examiner to report on the title of the applicant to the said funds, and on the 31st January, 1924, Mr. Longfield, the Examiner, made his report, and found that the applicant was entitled subject to two questions which he submitted for decision, namely:—

(1) On the true construction of the said will and codicils and in the events which have happened, did the testatrix devise the ultimate remainder in her moiety of the Newpass Estate to

(1) 3 A. C. 404.
(2) 10 Ir. Eq. R. 134.
(3) 7 L. R. Ir. 107.
(4) 71 L. T. 179.
(5) 17 Ir. Ch. R. 178.
(6) 5 L. J. Ch. 87.
(7) 6 Ch. D. 24.
(8) 5 Ir. C. L. R. 507.

Anne Fetherston and William Westby Moore, or die without having disposed of such ultimate remainder?

(2) In case it shall be held that the testatrix devised the said ultimate remainder to the said Anne Fetherston and William Westby Moore, did they take under the said devise as joint tenants or as tenants in common?

The matter came up for consideration before Mr. Justice Wylie on the 18th March, 1924, and, after argument, the learned Judge decided that upon the true construction of the said will and codicils of Elizabeth Westby, and in the events which have happened, the testatrix devised the ultimate remainder in her moiety of the said lands known as the Derryleagh Estate, and in the said perpetual yearly rent, and in her moiety of the Newpass Estate, to Anne Fetherston (wife of the Rev. Thomas Fetherston) and Wm. Westby Moore, and as regards the second question submitted in the said report, viz., whether the said Anne Fetherston and William Westby Moore took under the said devise as joint tenants or as tenants in common, the Court made no decision.

The present appeal is brought by Adeline Margaret Fetherston, who asks that the order of Mr. Justice Wylie be reversed, and that she be paid the funds in court as heiress-at-law of the said testatrix.

The question which arises in the case is as to whether the provision in the first codicil appointing the said Anne Fetherston and William Westby Moore executrix and executor and residuary legatees was sufficient to carry the real estate left undisposed of by the testatrix.

In order to arrive at a solution of this problem it is necessary to consider in some detail the provisions of the will and codicils of the testatrix, which were evidently drafted by a conveyancer of great skill.

The testatrix was possessed of considerable real and personal estate, and after revoking all former wills and giving directions as to her burial, she devised her interest in the Newpass Estate and all other lands in the County of Westmeath to Nicholas Westby and Sir John Sheppy Ripton, Bart., upon the trusts therein declared, but "subject to and charged and chargeable with the payment of the several annuities and yearly rent charges" thereinafter particularly mentioned. The uses declared were:—

(1) To the use of her nephew, the Rev. Thomas Fetherston, for life.

(2) After the decease of the said Thomas Fetherston, to the use and intent that Mrs. Anne Fetherston, his wife, in case she should survive him shall receive an annuity or rent charge of £300 so long as she shall not marry again, and if she did marry, then £200 for the residue of her life.

(3) Subject to the said life estate and annuity, to the use of Edmund Whitney Fetherston, the second son of the said Thomas

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Fetherston, for life, and after his decease, to the use of the first and every other son of the said Edmund Whitney Fetherston in tail male.

(4) In default of such issue, to the use of John Henry Fetherston, the third son of the said Thomas Fetherston, for life, and after his decease to the use of the first and every other son of the said John Henry Fetherston in tail male.

(5) And in default of such issue, to the use of Albert William Boleyn Fetherston, fourth son of the said Thomas Fetherston, for life, and after his decease, to the use of the first and every other son of the said Albert William Boleyn Fetherston in tail male.

(6) And in default of such issue, to the use of Boleyn Henry Francis Fetherston, fifth son of the said Thomas Fetherston, for life, and after his decease, to the use of the first and every other son of the said Boleyn Henry Francis Fetherston in tail male.

(7) And in default of such issue, then to the use of the sixth, seventh, and every other subsequently born son of the said Rev. Thomas Fetherston who shall be born in her lifetime or in due time after her decease, severally and successively, one after another, for life, with remainder to the use of the respective first and every other son and sons of his body lawfully begotten, severally and successively in tail male.

(8) In default of such issue, to the use of every other son of the said Rev. Thomas Fetherston who shall not be born in her lifetime or in due time after her death, and the heirs male of the body and respective bodies of such last-mentioned son or sons.

(9) In default of such issue, then to the use of the said Rev. Thomas Fetherston, his heirs, and assigns for ever.

There is then a name and arms clause, and a shifting use, upon which nothing turns, and a power to each tenant for life to create a jointure of £200 a year for any woman whom he might marry; provided, however, that the lands should not at any one time be charged with more than one jointure, except the jointure which was charged upon the lands in the first instance for Mrs. Anne Fetherston in case she should survive her husband.

The testatrix then charges said lands with the payment of certain annuities:—1. To her step-daughter, Mary Westby. 2. To her man-servant, Richard Major. 3. To her grand-nephew, Thomas John Fetherston, until he should succeed to the baronetcy.

The testatrix then devises the Derryleagh Estate to the same trustees in trust for the same beneficiaries and their issue, but in a different order, with the ultimate gift, as in the former case, to the use of the said Rev. Thomas Fetherston, his heirs, and assigns for ever; and she also charged the Derryleagh Estate with a certain annuity to a Miss Bayly.

She then bequeathed all rents and arrears of rents which

should be due out of both estates at her death to the Rev. Thomas Fetherston for his own use and benefit, and she also gave him her interest in certain houses in Peter Street and Thomas Street, in the City of Dublin, and the arrears of rent due in respect thereof.

Up to this the testatrix never mentioned her personal estate, except to the extent of the arrears of rent of her already devised real estate, and the scheme of her will, so far, was confined to giving successive estates tail, with an ultimate remainder to the Rev. Thomas Fetherston, his heirs, and assigns for ever.

Testatrix now proceeds to deal with her personal estate, which was also considerable, and her dispositions of this are likewise very clear. She directs in the first instance that her debts and legacies shall be paid out of her personal estate, and then she leaves pecuniary legacies, varying in amount from £20 to £1,000. She then makes specific gifts of her jewellery, and concludes her will with the following words:—"I leave all the residue and remainder of my property after payment of my debts, legacies, and funeral and testamentary expenses to the said Rev. Thomas Fetherston and my said step-daughter, Mary Westby, to be equally divided between them, share and share alike, and I appoint them my residuary legatees and executor and executrix of this my will."

On the 14th December, 1852, the testatrix makes the first codicil to her will, whereby after reciting that by her said will she had appointed the Rev. Thomas Fetherston and Mary Westby executor and executrix and also her residuary legatees, but finding that the said Rev. Thomas Fetherston is in delicate health and that the said Mary Westby is unwilling to take the burden of the execution thereof, and is also unwilling to be a residuary legatee, she appointed new residuary legatees in the following words:—"I now nominate, constitute, and appoint Anne or Nannie Fetherston, now of Rugby, and wife of the said Rev. Thomas Fetherston, and William Westby Moore, of Upper Fitzwilliam Street, in the City of Dublin, and of 'Hermitage,' Rathfarnham, in the County of Dublin, Barrister-at-Law, my executrix and executor and also my residuary legatees and in the place and stead of the said Rev. Thomas Fetherston and Mary Westby."

The testatrix then gives certain further legacies, to which it is not necessary to refer, and creates another annuity of £12 payable out of the Newpass property to Richard Major, to keep him from want.

On the 8th May, 1853, the said Elizabeth Westby made a second codicil for the purpose of making alterations occasioned by the death of certain legatees, and by two subsequent codicils dated 25th May, 1855, and 3rd March, 1856, the testatrix made some further alterations as regards pecuniary legacies and annuities, but did not alter the disposition of her property.

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All the successive estates tail in the real estate have been exhausted, and upon the death of the said Henry Ernest William Fetherston-Whitney, under the limitations of the said will and codicils, the property would go to the Rev. Thomas Fetherston, his heirs and assigns, but, unfortunately, the said Rev. Thomas Fetherston died in the lifetime of the testatrix, and this gift can have no operation. The dispute now is entirely between Adeline Margaret Fetherston, who is heiress-at-law of the testatrix, and who would be entitled to the estates, or the funds representing them if the residuary clause in the will, as altered by the codicils, was not sufficient to carry the real estate, and the representatives of Anne Fetherston and William Westby Moore, who would be entitled, if the appointment of the said Anne Fetherston and William Westby Moore as residuary legatees was sufficient to carry the real estate.

There is no doubt, as was laid down by the House of Lords in the case of *Singleton* v. *Tomlinson* (1), that the term "residuary legatee" is not of an invariable nature, and must be fashioned and moulded by the context of the will, and as was particularly pointed out by Lord Cairns in that case (at page 417):—"There is no doubt that if you found the term 'residuary legatee' standing alone, above all, if you found it in a will which appeared to make a division between real property and personal property, the prima facie meaning of 'residuary legatee' would be the person taking what the law calls the residue of the personal property."

The frame of the present will seems to me to be based upon a clear division between the real and personal property of the testatrix. She first devises all her lands in the County of Westmeath to trustees, for a life estate to Thomas Fetherston, with successive estates tail to his sons, charged with certain annuities and jointures, and with an ultimate remainder to the use of the said Rev. Thomas Fetherston, his heirs, and assigns for ever. Testatrix then devises her lands in the County of Cavan upon similar trusts, except that the order of the estates tail was transposed in certain cases, and with a like ultimate remainder to the use of the Rev. Thomas Fetherston, his heirs, and assigns for ever.

Having thus made a complete disposition of all her lands, she proceeds to deal with her personal estate, and the part of the will dealing with such personal estate commences with the following words:—"I direct that all the debts which I shall justly owe at the time of my death shall be paid by my executors hereinafter named out of my personal estate. I leave and bequeath the following legacies to the several following persons to be paid in like manner out of my personal estate, that is to say"—and then follows the enumeration of many pecuniary legacies, and specific legacies of trinkets, etc.

(1) 3 A. C. 404.

The draftsman of this will was very skilful and careful in the use of words. He always uses "give and devise" in connexion with the freehold estates in Westmeath and Cavan, "give, devise, and bequeath" in regard to the property in Dublin held for lives and years, "leave and bequeath" in regard to the arrears of rent due out of the devised lands, and "leave" in connexion with pecuniary legacies. He uses the word "leave" twenty-seven times in the will, and always in connexion with his personal estate, and the word "leave" is the word, and the only word, of gift in the residuary clause, which is as follows:— "I leave all the residue and remainder of my property after payment of my debts, legacies, and funeral and testamentary expenses to the said Rev. Thomas Fetherston and my step-daughter, Mary Westby, to be equally divided between them, share and share alike, and I appoint them my residuary legatees and executor and executrix of my will."

The word "property" is no doubt in itself of wide signification, but I think that in this case the testatrix herself has shown that she means by it only personal estate, because at the commencement of the portion of her will dealing with personal estate she specifically directs her executors to pay her debts out of her personal estate, and the legacies out of her personal estate, and when she uses the words: "I leave all the residue and remainder of my property after payment of my debts, legacies, and funeral and testamentary expenses," it is, I think, clear that she attached to the word "property" in that sentence the same meaning that she had attached to the words "personal estate" at the commencement of the portion of the will dealing with such personal estate. If she meant the word "property" to include residuary real estate, it would mean that if the Rev. Thomas Fetherston had survived the testatrix, and the intervening estates had all failed in his lifetime, he would be entitled to all the real estate under the disposition contained in the real estate portion of the will, but would only be entitled to a moiety of the real estate under the residuary clause, which, to my mind, was clearly not within the contemplation of the testatrix at all.

There is in this case a specific and complete devise of the real estate, and in this connexion the case of *In re Gibbs, Martin* v. *Harding* (1), is very much in point. It was there held by Joyce J. that, in considering whether the naming of a residuary legatee constituted a residuary devise, the fact that at the date of the will the testatrix possessed no real estate other than that specifically and completely disposed of must be borne in mind; although, of course, it is not conclusive on the point, as was laid down by Eve J. in *In re Stephen, Stephen* v. *Stephen* (2).

It has been held in several cases that where part only of the real estate is specifically devised, the appointment of residuary

(1) [1907] 1 Ch. 465.

(2) [1913] W.N. 210.

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legatees may carry the undisposed of realty: *Hughes* v. *Pritchard* (1), and see also *In re Methuen and Blore's Contract* (2). But even this principle has not been held to apply where the residuary legatee is one of the specific devisees: *Hillas* v. *Hillas* (3); *In re Morris, Morris* v. *Atherden* (4).

Joyce J. deals with this point in his judgment in *In re Gibbs, Martin* v. *Harding* (5), in words specially applicable to the present case. He says (at page 468):—"It may be arguable that when a testator, after specific dispositions of part of his real estate, appoints a residuary legatee, such legatee will take the residue of his real estate; but if this argument ought to be allowed to prevail in such a simple case, I think there is a material difference where the will contains specific dispositions of all the real estate, and the person named as residuary legatee is one of the specific devisees. In the present case she is the person who takes under the last specific devise in the will."

I am quite satisfied for many reasons, including:—

(*a*) The fact that the will shows a clear division between real and personal property, and makes a complete disposition of each, and uses appropriate words exclusively in the gifts of each.

(*b*) That the testatrix had no real estate other than that of which the will contained specific and complete dispositions, and that under these dispositions the Rev. Thomas Fetherston, if he had survived the testatrix, would, on failure of the previous estates, become absolutely entitled in fee to the whole, while if the residuary clause was applied to the real estate he would only have been entitled to a moiety.

(*c*) That the will itself, from its context, shows that the word "property" used in connexion with the residuary clause was limited to personal estate—by reason, amongst other things, of the facts that the annuities were charged only on the real estate; that the debts and legacies were specifically declared in the first instance to be payable out of her personal estate, and that the residue of her property referred to in the residuary clause is, not the property charged with the annuities, but is the property which remains after payment of her just debts, legacies, and funeral, and testamentary expenses, i.e., personal estate, upon which these are specifically charged;

that the residuary clause does not carry the real estate, and that consequently the order of Mr. Justice Wylie must be discharged and the appeal allowed.

The question still remains as to whether the construction of the residuary clause in the will is affected by the appointment of new residuary legatees in the first codicil. The words of this codicil are:—"Forasmuch as by my said will I appointed the Rev. Thomas Fetherston and Mary Westby executor and executrix of my said will and also my residuary legatees, but

(1) 6 Ch. D. 24.
(2) 16 Ch. D. 696.
(3) 10 Ir. Eq. R. 134.
(4) 71 L. T. 179.
(5) [1907] 1 Ch. 465.

finding that the said Rev. Thomas Fetherston is in delicate health and that the said Mary Westby is unwilling to take the burden of the execution thereof, and is also unwilling to be a residuary legatee, I now nominate, constitute, and appoint Anne or Nannie Fetherston, now of Rugby, and wife of the said Rev. Thomas Fetherston, and William Westby Moore, of Upper Fitzwilliam Street, in the City of Dublin, and of 'Hermitage,' Rathfarnham, in the County of Dublin, Barrister-at-Law, my executrix and executor and also my residuary legatees, and in the place and stead of the said Rev. Thomas Fetherston and Mary Westby."

If this codicil was to be regarded as a mere appointment of residuary legatees, it would be clearly insufficient to carry the real estate, but assuming in favour of the respondents that upon its true construction it is simply to be regarded as substituting two new names for the persons named in the original residuary clause, I am clearly of opinion, as already stated, that the residuary clause does not carry the real estate.

RONAN L.J. :—

In this case I have to differ from my colleagues. We are told that the meticulous care with which the will was prepared shows that the testatrix used "devise" in reference to real estate and "bequeath" when dealing with personal estate, but "leave"—which applies equally to both—is also used. The testatrix says :—"I leave all the residue and remainder of my property after payment of my debts, legacies, and funeral and testamentary expenses to the said Rev. Thomas Fetherston and my said step-daughter, Mary Westby, to be equally divided between them, share and share alike, and I appoint them my residuary legatees and executor and executrix of this my will." That is a perfectly unambiguous residuary gift of all the property. The intention of the testatrix was that in no event was there to be an intestacy. Accordingly, the word "devise"—applicable to real estate—is abandoned, and the word "bequeath"—applicable to personal estate—is also abandoned; and the word "leave"—applicable to both classes of property—is used.

For these reasons I think that the judgment of Wylie J. was right.

O'CONNOR L.J. :—

I am of opinion that this appeal should be allowed.

The most noticeable thing about the will which we have to construe is that it is drawn by a trained lawyer with an attempt at meticulous care. In the great bulk of the document the phraseology is most apt; and for every possible contingency provision was sought to be made. And, yet, there is a slip somewhere; if the appellant is right, the residuary clause in the will is not correct in its language; if the respondents are right, the language of the codicil is wrong, and, to some extent,

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the language of the residuary clause in the will is wrong, and a great inconsistency is manifest between the residuary clause in the will and the rest of the will. Where is the slip? What was the intention of the testatrix as far as we can make it out from a faulty instrument?

Now, let me pause to consider the effect of the residuary clause in the will, on the assumption that that clause comprised the real estate. It gave the real estate (as well as the personal estate) to the Rev. Thomas Fetherston and Mary Westby as tenants in common. The gift, so far as either of the two residuary devisees is concerned, could only take effect if he or she survived the testatrix, and the preceding limitations of the real estate failed. If these events happened, Thomas Fetherston was to get one half of the real estate. But, in the same events—that is, his surviving the testatrix and the failure of the previous limitations—he was to get the whole. Surely an inconsistency so glaring, so obvious, so great, as not to be lightly attributed to the trained and—up to a point—careful lawyer who drew this will! This inconsistency disappears if we accept the appellant's contention.

In order to displace the prima facie meaning of the words, "leave all the residue and remainder of my property," Mr. Jellett relies on certain other important matters in the will and codicil.

First, he relies on the use of the words "residuary legatees" in the codicil. This seems to me very important. Either the objects of the bounty in the codicil are put in the same position as the objects of the bounty in the will, or they are not. If they are not, caedit quaestio, for they are named as legatees and not devisees. If they are, the codicil can fairly be used for the purpose of helping to a construction of the will. If so, is not the suggestion very strong that in using the word "legatees" the trained lawyer meant "legatees" and not "devisees"?

Second, a similar suggestion is conveyed by the use of the words "residuary legatees" in the will. Mr. Jellett uses them to explain and displace the prima facie meaning of the word "property" in the same sentence.

Third, there is the description of the property itself as subject to "debts and legacies." The real estate was subject to annuities or rent charges (so designated in the will), yet there is no mention of such.

Fourth, the will, as Mr. Jellett says, is in two parts:—the first deals with the real estate, and is intended to be exhaustive; the second, he suggests, deals with personal estate, and is also intended to be exhaustive. I think he is right.

In my opinion the true solution of this problem is that the word "personal" was accidentally left out before "property," and I think that this theory has so many circumstances to support it, that it should be accepted and acted on.

Solicitors for appellant: *Collis & Ward.*
Solicitors for respondents: *Stephen Gordon & Sons.*

C. L.

IN THE MATTER OF THE ESTATE OF HENRY JOHN BERESFORD CLEMENTS, OWNER.

L. C.
(I. F. S.)
Wylie J.
1924.
May 8.
June 16.

Landlord and tenant — Land purchase — Redemption of fee-farm rent — Matters to be considered in fixing price — Land Act, 1923 (*No.* 42 *of* 1923), *sects.* 3, 38.

Sect. 38 of the Land Act, 1923 (No. 42 of 1923), deals with the redemption of fee-farm and certain other rents, where a parcel of untenanted land situate in a non-congested districts county is held under a fee-farm grant or lease, and the proprietor of the parcel applies to the Land Commission for an advance for the purpose of redeeming the rent; but the section does not contain any directions as to what matters are to be taken into consideration in fixing the redemption price. The grantee of a fee-farm grant contended that, the Land Act of 1923 being a Land Purchase Act, the redemption price of the fee-farm rent under sect. 38 should be arrived at by ascertaining what sum would give the grantee or tenant the appropriate reduction in his rent like any other non-judicial tenant. Wylie J. *held* that this contention was not sound.

Matters to be regarded in fixing the redemption price under sect. 38 considered by Wylie J.

MOTION.

Richard Arthur Warren, the "proprietor" under an indenture of fee-farm grant of certain lands in Co. Kildare, held at the annual fee-farm rent of £105 0s. 6d., applied under sect. 38 of the Land Act, 1923, for an order redeeming the said fee-farm rent and fixing the redemption price thereof. The "owner" of the rent was Henry John Beresford Clements.

Tobias for the proprietor.

Oliver Murphy for the owner.

Cur. adv. vult.

June 16.

WYLIE J.:—

The grantee in this case argues that the Act of 1923 is a Land Purchase Act, and that sect. 38 is a Land Purchase section, and that the redemption price of the fee-farm rent should be arrived at by ascertaining what sum would give the grantee or tenant the appropriate reduction in his rent like any other non-judicial tenant.

I do not think this contention is sound. Sect. 73, sub-s. 2, expressly excludes land held under a fee-farm grant from the definition of tenanted land. Why should the grantee be deprived of the ordinary rights of a tenant by sect. 73, sub-s. 2, if he is to have the same rights under sect. 38? What I have to do is to "redeem" the rent—"fix the redemption price" are the words. There are no directions given in the section as to what I am to take into consideration in fixing such price; and, as this is the first case arising under this section, I think it right to state how I have arrived at the price.

L. C.
(I. F. S.)
Wylie J.
1924.

In re CLEMENTS'S ESTATE.

I have first, and chiefly, considered what is the security for the rent. To arrive at this I have taken into account :—

(*a*) The evidence given by both grantor and grantee as to the letting value of the holding, its productive qualities, the nature of the soil, and the other elements tending to increase such letting value, such as proximity to a town or city.

(*b*) I have had the holding inspected by an assessor, who is not an official of the Land Commission, and who has reported to me what is his view as to its letting value, and particularly what should be the fair rent of the holding were such a rent to be fixed on it.

(*c*) I have taken into account the buildings on the holding as increasing the letting value, and thereby forming part of the security for the rent, to this extent—that I have added 3 per cent. of the actual present value of the buildings suitable to the holding to the letting value.

With this evidence before me, I have then asked myself the question : Is this rent an absolutely first-class security, as good as trustee or gilt-edged stock? If it were, I would fix the redemption price at such amount of bonds as would give the grantor the same income. There is no option as to what the new security is to be, as the rent is to be redeemed in 4½ per cent. bonds. It will, therefore, take slightly more than twenty-two years' purchase of an absolutely well-secured rent to put the landlord in the same position as regards income.

If the rent is not absolutely secured, I then ask myself in what category does it come, and what is a fair redemption price, having regard to the security?

I have not taken into consideration whether, in the ultimate event, the grantee may not have to pay more during the currency of the annuity than he did before.

I have not taken into account the security to the State, except in so far as it is necessarily involved in the security for rent.

I have not taken into account the proviso to sect. 3 of the 1923 Act, as there was no price received by the vendor to which I might have regard. If the grantee were also a landlord and paid a rent out of land, part of which, being tenanted, was purchased by his tenant, in redeeming that part of the rent which would be apportioned on the untenanted lands in hand, I would, I think, have to consider the proviso to sect. 3.

In the present case I have fixed the price of this £105 rent at £1,570, and the grantee under the section has also to pay the costs of title, which will be added to the amount of the advance on his holding.

Solicitors for the proprietor : *T. W. Hardman & Sons.*
Solicitors for the owner : *Beauchamp & Orr.*

T. C. T.

O'REILLY, LANDLORD; ADAMSON, TENANT.

L. C.
(I. F. S.)
Wylie J.
1924.
Nov. 4.

Landlord and tenant — Land purchase — Proviso in lease excluding Land Acts—Whether applicable to Land Act, 1923—Land Act, 1923 (No. 42 of 1923), sects. 38, 79.

A proviso in a lease excluding the application to the demised lands of "the provisions of the Landlord and Tenant (Ireland) Act, 1870, or the Land Law (Ireland) Acts, 1881 to 1887, or any of them, or any other Act or Acts amending the same or any of them" was held not to exclude the application of the provisions of the Land Act, 1923, to the demised lands.

MOTION.

By Indenture of Lease, dated 11th May, 1891, and made between Joseph Richard O'Reilly of the first part, Charles Washington Studdert of the second part, and Thomas Julian Studdert of the third part, the lands of Grennans, Co. Meath, were demised to the said Thomas Julian Studdert for 100 years at the annual rent of £469 16s. 6d., subsequently adjusted to £458 6s. The lease contained the following proviso:—"Provided always and it is hereby expressly contracted and declared that none of the provisions of the Landlord and Tenant (Ireland) Act, 1870, or the Land Law (Ireland) Acts, 1881 to 1887, or any of them, or any other Act or Acts amending the same or any of them shall apply to these presents or the contract of tenancy hereby created." The tenant of the holding having applied under s. 38 of the Land Act, 1923, for an order redeeming the rent and fixing the redemption price, the landlord objected that the proviso in the lease excluded the holding from the operation of the Act.

Poole, for the landlord:—I submit that the proviso in the lease is sufficient to exclude the holding from the Act. The Act of 1923 must be taken to be an amendment of the Redemption of Rent Act, 1891, which is itself an amendment of the Acts of 1881 and 1887. The Act of 1891 enabled fee-farm grantees and tenants at long leases to redeem their rents, if full agricultural rents, or, in the event of the landlord's objecting, to have a fair rent fixed. The only effect of s. 38 is to abolish the necessity of showing that the rent is a full agricultural rent, and to do away with the landlord's option to have a fair rent fixed in lieu of having the old rent redeemed. [He referred to *Ferguson, tenant*; *Bradstreet, landlord* (1).]

Shannon K.C. (with him *Russell*), for the tenant:—It cannot be successfully contended that the proviso in the lease embraces the Act of 1923. The latter Act in certain important aspects is an entirely new departure.

WYLIE J.:—

I decide against Mr. Poole's objection. I do not think that the particular wording of this proviso can be construed into an agreement to exclude the operation of the Act of 1923.

Solicitors for the landlord: *A. O'Hagan & Son.*
Solicitors for the tenant: *W. J. Shannon & Co.*

T. C. T.

(1) 22 L. R. Ir. 303.

L. C. Wylie J. (*I. F. S.*) 1924.

May 27. June 16.

Appeal.

July 29.

DAVID CARLETON, Owner; PATRICK COADY, Tenant.

Landlord and Tenant — Land purchase — "Tenanted land" — Exclusion of lettings for temporary convenience—Land Law (Ireland) Act, 1881 (44 & 45 *Vict. c.* 49), *sect.* 58, *sub-s.* 7—*Land Act*, 1923 (*No.* 42 *of* 1923), *sects.* 24, 73, *sub-s.* 2, 79.

Sect. 73, sub-s. 2, of the Land Act, 1923 (No. 42 of 1923), provides that "the expression 'tenanted land' means land held under any contract of tenancy other than . . . a letting . . . for temporary convenience, or to meet a temporary necessity . . ."

Sect. 58, sub-s. 7, of the Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49), excludes for the purpose of fair rent applications holdings let for temporary convenience or to meet a temporary necessity, provided that any such letting made after the passing of that Act shall be by contract in writing, which "shall express the purpose for which such letting is made."

Held (affirming Wylie J.), that the exclusion of lettings for temporary convenience from the Act of 1923 is not limited as in the Act of 1881, and that a holding in fact let for temporary convenience is excluded under sect. 73, sub-s. 2, of the Act of 1923, although the purpose of such letting is not expressed in writing in the contract of tenancy.

Motion.

This was an application by the landlord to the Judicial Commissioner for a declaration that the holding in question was not one to which the Land Act, 1923 (No. 42 of 1923), applied.

By lease dated March 5th, 1906, the tenant held from the landlord a farm of land containing 42 acres, Irish plantation measure, in Ennistown, Co. Meath, for the term of 20 years, at the yearly rent of £80. Nothing was stated in the lease as to the object with which the letting was made. The landlord applied to the Judicial Commissioner for a declaration that the holding was not one to which the Land Act, 1923, applied. At the hearing of the application David Carleton, the landlord, was examined. He deposed that he was a collector of income tax since 1896, and that when he granted the lease to Henry Coady, the predecessor of the present tenant, he told him he would take up the lands at the end of the term. He calculated that he would retire at the end of the term. Coady had a position on the railway at Kilmessan, and he also had a public-house at that station. He let the lands in grazing. He also let the house, and he never resided at the farm. The landlord refused to give the lessee an extension of the lease. Before notice of this application was served, the landlord informed the present tenant (the brother and personal representative of the original lessee) that he did not intend to sell under the Land Act.

Herbert Wilson K.C., for the landlord.

C. Murphy, for the tenant.

Cur. adv. vult.

June 16.

Wylie J.:—

I am satisfied that this letting was one for temporary convenience, and that this fact was known to and acquiesced in by

both parties. Indeed, Mr. Murphy, for the tenant, did not call any witnesses to controvert this, and relied solely on the fact that under sect. 58, sub-s. 7, of the Act of 1881 a letting for temporary convenience should express the purpose for which such letting is made. He argues that this section is incorporated with the Act of 1923 by sect. 79 of that Act, and that "a letting for temporary convenience" in sect. 73 of that Act must accordingly mean a letting for temporary convenience made in writing and expressing the purpose of the letting.

The question which I have to decide therefore is: Is a holding excluded from the Act of 1923 by reason of the letting being for temporary convenience, or to meet a temporary necessity, even though the contract is silent as to such convenience or necessity and the reasons for it? As far as I can discover, lettings for temporary convenience are dealt with four times in the Land Acts: (1) by the Land Act, 1870, sect. 15, sub-s. 4; (2) by the Land Law Act, 1881, sect. 16; (3) by the Land Law Act, 1881, sect. 58, sub-s. 7; (4) by the Land Act, 1923, sect. 73, sub-s. 2.

It must be mentioned that the Land Law Acts and the Land Purchase Acts are two separate codes: see sect. 48 of the Land Law Act, 1896; and it must also be noted that the Land Law Act, 1881, is both a Land Law Act and a Land Purchase Act: see Part V of that Act. Sect. 58 of the Act of 1881 does not apply to Part V. Therefore the provisions as to the necessity for writing and for expressing the purpose in lettings for temporary convenience are Land Law provisions. If the several sections where "temporary convenience" is mentioned be referred to and the effect of each considered, it will, I think, illustrate the distinction. The words in the Act of 1870 are: "any holding let and expressed in the document by which it is let to be so let for the temporary convenience," &c. If a letting fulfilled these conditions, the tenant was deprived of rights to compensation under the preceding provisions of the Act.

Sect. 58 of the 1881 Act begins with the words: "This Act, with the exception of so much thereof as amends the Landlord and Tenant (Ireland) Act, 1870, in respect of compensation for improvements, and with the exception of Part V of this Act, shall not apply to tenancies in . . ." Then follow various exclusions, and sub-s. 7 excludes a holding let for temporary convenience, "provided that any such letting made after the passing of this Act shall be by contract in writing, which shall express the purpose for which such letting is made."

The effect of this section was to exclude a tenant from having a fair rent fixed if the conditions in the proviso were fulfilled. It did not affect the Purchase provisions of the Act, which were contained in Part V. Sect. 16 of the 1881 Act, which is a section amending the 1870 Act, gives a tenant holding under a tenancy less than a yearly tenancy the same rights as a yearly tenant, "except where land is let merely for temporary convenience or to meet a temporary necessity." There is no proviso about

L. C. Wylie J. (I. F. S.) 1924.

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writing and purpose, such as are contained in sub-s. 7 of sect. 58.

Sect. 73, sub-s. 2, of the 1923 Act is a section which defines "tenanted land." All land which is not within it is "untenanted." In other words, it says that lettings for temporary convenience are not lettings at all. The section commences with the words: "In this Act"; and, although those words may not govern sub-s. 2, they cannot, I think, be ignored in the construction of the Act.

This 1923 Act confers much greater rights on the tenant than were ever previously given. It also gives the Land Commission much wider powers. The holding in the present case is in a non-congested county. If the tenant's contention be sound, however, it would apply also in congested counties, and might seriously handicap the Commission in dealing with congestion problems, and confer rights on the tenants which were never intended.

Again, it is to be noted that sect. 58, sub-s. 7, of the Act of 1881 does not say that parol lettings for temporary convenience made after 1881 are not lettings for temporary convenience; on the contrary, it recognises that there are, and will be, such lettings, but says they are not to be considered as such for the purposes of the Land Law provisions of the Act of 1881, the words being: "provided that any such letting if made after the passing of this Act," &c.

The provision of the 1923 Act applies to all lettings for temporary convenience. I am asked to import into the section of that Act, which is one of compulsory purchase, the provisions of an Act expressed on its face to be passed for a wholly different purpose. I do not think I can do so.

I am of opinion that sect. 58, sub-s. 7, of the 1881 Act does not define "temporary convenience" for all time and for all purposes, declaring that there can be no letting for temporary convenience unless its formalities are complied with. I think it merely provides that, if a landlord wishes to allege that a tenancy created after 1881 is excluded from the benefits of the Land Law provisions of the 1881 Act, he must set out in the contract of tenancy the purpose of the letting.

I therefore decide that a holding is excluded from the Act of 1923 if the letting was made for temporary convenience, even although the contract is silent as to the purpose of such letting; and accordingly I grant the landlord's motion, with £7 7s. costs.

T. C. T.

July 29.

The tenant appealed (1) from Mr. Justice Wylie's order, upon the grounds "that the lease under which the holding in the said order mentioned was let does not express the purpose for which the letting was made, pursuant to the provisions of sect. 58,

(1) In the Supreme Court, before KENNEDY C.J., O'CONNOR and FITZGIBBON JJ.

sub-s. 7, of the Land Law (Ireland) Act, 1881, and that oral evidence to show that the said letting was made for temporary convenience or to meet a temporary necessity was inadmissible, and the decision of Mr. Justice Wylie that such evidence was admissible and that the said holding is not tenanted land within the meaning of sect. 73, sub-s. 2, of the Land Act, 1923, is incorrect, and that the judgment of the learned Judge is erroneous in point of law, and should be reversed." The notice of appeal asked for a declaration that the holding was one to which the provisions of the Land Act, 1923, applied, and that it was "tenanted land" within the meaning of the Act.

C. Murphy, for the appellant :—

Under sect. 73, sub-s. 2, of the Land Act, 1923 (No. 42 of 1923), the expression "tenanted land" does not include "a letting for temporary convenience or to meet a temporary necessity." This section must be construed by reference to sect. 58, sub-s. 7, of the Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49), which provides that the Act is not to apply to tenancies in any holding let for temporary convenience or to meet a temporary necessity, provided that any such letting made after the passing of the Act "shall be by contract in writing, which shall express the purpose for which such letting is made." There can be no exclusion under the Act of 1923 on the ground of temporary convenience or to meet a temporary necessity unless the purpose of the letting is expressed in the instrument creating the tenancy. Oral evidence to show the purpose of the letting was not admissible.

H. Wilson K.C. (with him *H. Vaughan Wilson*), for the respondent :—

Throughout the entire Land Code a clear distinction is drawn between Land Law Acts and Land Purchase Acts. Sect. 58, sub-s. 7, of the Land Law (Ireland) Act, 1881, was passed to prevent unnecessary applications to have fair rents fixed, and its terms cannot be imported into sect. 73, sub-s. 2, of the Land Act, 1923.

KENNEDY C.J. :—

We are all of opinion that this appeal fails. The fact that there may be an anomaly does not necessarily mean that there are any difficulties in arriving at the meaning of the express words of the statute upon which this case turns. Sect. 58 of the Land Law (Ireland) Act, 1881, is not a definition section. It simply provides that the fair rent provisions of the Act shall not apply to certain specified classes of tenancies. Sub-s. 7 of sect. 58 excludes "any holding let to the tenant during his continuance in any office, appointment, or employment, or for the temporary convenience or to meet a temporary necessity either

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of the landlord or tenant: Provided that any such letting made after the passing of this Act shall be by contract in writing, which shall express the purpose for which such letting is made."

The Land Act, 1923 (No. 42 of 1923), contains a number of provisions applying to tenanted land, but it excepts from the operation of the Act several classes of tenanted land, one of which is land held "for temporary convenience or to meet a temporary necessity." Mr. Murphy's argument is that exclusion on the ground of temporary convenience in the Act of 1923 is limited, as in sect. 58, sub-s. 7, of the Land Law (Ireland) Act, 1881, and that there is no exclusion unless the purpose of the letting is expressed in the written contract of tenancy. There is nothing, express or implied, in sect. 73 of the Land Act, 1923, to support such a limitation. A holding in fact held for temporary convenience is therefore excluded from the Act of 1923, although the purpose of such letting is not expressed in writing in the contract of tenancy.

O'CONNOR J.:—

I concur. It seems to me that the meaning of the Land Act, 1923, is clearly stated in sects. 24 and 73 of the statute. Sect. 24 enacts that: "Subject to the provisions of this Act, and notwithstanding anything contained in any other enactment, all tenanted land, wherever situated, and all untenanted land situated in any congested districts county, and such untenanted land situated elsewhere, as the Land Commission shall, before the appointed day, declare to be required for the purpose of relieving congestion or of facilitating the resale of tenanted land, shall, by virtue of this Act, vest in the Land Commission on the appointed day . . ." Sect. 73 contains a clear, but artificial, definition of "tenanted land" and of "untenanted land." The section provides that the expression "tenanted land" means "land held under any contract of tenancy other than . . . a letting . . . for temporary convenience or to meet a temporary necessity, and the expression 'untenanted land' shall be construed accordingly." In other words, lands let for temporary convenience are "untenanted lands." Mr. Murphy reads the section as meaning land held under a contract of tenancy other than a letting for temporary convenience, so expressed in the terms of the letting. He seems to think that the Act of 1923 and the preceding Acts must be read together; but even if they were incorporated in one Act, the definition of "tenanted land" in sect. 73 would prevail. It is the only definition of tenanted land in the Acts, and it does not conflict with anything else in the whole code.

FITZGIBBON J.: I concur, and for the reasons stated by the Chief Justice.

Solicitors for the appellant: *Barrington & Son.*
Solicitors for the respondent: *John Clark & Co.*

C. L.

KEELAN *v.* GARVEY (1).

(1923. No. 496.)

Appeal.
(I. F. S.)
1924.
Nov. 3, 4.
Dec. 9.

Statute of Limitations—Husband and wife—Husband in possession of lands —Husband going away and leaving wife in possession—Wife claiming lands under Statute of Limitations—Wife's claim unsustainable—Wife's title registered — Rectification of the register — Local Registration of Title (Ir.) Act, 1891 (54 & 55 *Vict. c.* 66), *sects.* 29, 30, 34, 92, 93.

On appeal, the judgment of Molony L.C.J., reported *ante*, p. 107, was reversed by the Supreme Court (2).

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(1) In the Supreme Court, before KENNEDY C.J. and O'CONNOR and FITZGIBBON JJ.

(2) The decision of the Supreme Court will be found reported [1925] 1 I.R. 1.—A. D. B. (ED.).

H. L.
1924.
May 30.

[HOUSE OF LORDS.]

THE ATTORNEY-GENERAL (AT THE RELATION OF THE CO. DOWN COUNTY COUNCIL) *v.* THE LAGAN NAVIGATION COMPANY (1).

Highway—Repair—Bridge carrying public road over canal—Collapse caused by ordinary traffic—Liability of Canal Co.—Standard of repair—Change in character and volume of ordinary traffic—6 & 7 *Vict. c.* civ, *sects.* 62, 63, 64, 65, 66.

The House of Lords has, by a majority (Viscount Finlay, Lord Atkinson, Lord Sumner, and Lord Darling; dissentiente Lord Blanesburgh), affirmed the decision of the Court of Appeal in Northern Ireland which is reported in [1923] 1 I.R. 91. Their Lordships' judgments are reported, [1924] A.C. 877.

(1) In the House of Lords. Present: VISCOUNT FINLAY, LORD ATKINSON, LORD SUMNER, LORD BLANESBURGH, and LORD DARLING.

INDEX.

ACTION FOR RECOVERY OF LAND—OWNER OF REGISTERED CHARGE — *Mortgagee against mortgagor — Mortgage by way of charge only—Supreme Court of Judicature Act (Ireland)*, 1877 (40 & 41 *Vict. c.* 57), *sect.* 27, *sub-s.* 1—*Local Registration of Title (Ireland) Act*, 1891 (54 & 55 *Vict. c.* 66), *sect.* 40, *sub-ss.* 2 *and* 4—*Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *sect.* 2, *sub-s.* 5; *sect.* 7, *sub-s.* 1 (*c*); *and sect.* 19.] The defendant D., the registered owner of certain lands, being indebted to a bank to secure moneys already advanced and further advances, executed a deed of charge, by which he covenanted to pay all moneys then or thereafter due, and interest thereon; and all moneys so covenanted to be paid were thereby declared well charged on the lands therein comprised. The deed of charge contained an assent by D. to the registration of the charge as a burden affecting the lands. It also provided that all the powers conferred upon mortgagees by the Conveyancing Act, 1881, should apply to the security, and that the powers of leasing conferred on a mortgagor in possession by the Conveyancing Act, 1881, should not be exercised without the consent in writing of the bank. The deed of charge was duly registered. D. made default in payment of principal and interest due under the deed, and the bank instituted an action for recovery of the land. *Held* by the Court of Appeal, N.I. (Sir Denis Henry, Bart., C.J., and Andrews L.J.), on case stated by Moore L.J., that the bank were mere chargeants on the lands, who had not either the estate or the statutory power necessary to enable them to recover possession. *Northern Banking Company, Limited*, v. *Devlin* [APP. (N.I.) 90.

ADMINISTRATRIX NOT ADMINISTERING ESTATE — CONTINUING TO CARRY ON DECEASED'S BUSINESS WITHOUT AUTHORITY — STOCKS AND SHARES PURCHASED BY ONE OF NEXT-OF-KIN OUT OF PROFITS OF BUSINESS—

ADMINISTRATRIX—*continued.*
Scrip deposited with bank as security —Bank not having notice of breach of trust—Other next-of-kin adopting the trading and seeking to follow assets—Claim which is a mere equity conflicting with an equitable estate—Priority of equitable estate—Equities not equal—Equitable mortgage made in breach of trust — Trustee and cestuis que trustent—Negligence of trustee—Whether loss falls on cestuis que trustent or on strangers.] T.S., who carried on two separate businesses, died intestate, and letters of administration were granted to his widow, E. S. E. S., instead of administering his estate, continued to carry on both businesses. Three years later E. S. appointed her eldest son, J. B. S., to manage one of the businesses, which was carried on under the name of T. S. & Co. For this purpose she used to sign blank cheques in the name of T. S. & Co., leaving them to be filled up by J. B. S. About eight years after the death of T. S., E. S. transferred her banking account to the defendant bank, where she opened an account in the name of T. S. & Co. J. B. S. also opened an account in his own name with this bank. J. B. S., instead of using the signed blank cheques for the purposes of the business, used them to pay for certain stocks and shares, which he had bought in his own name. In consequence of these purchases, the account of T. S. & Co. got into debit. J. B. S. also borrowed money from the bank to purchase a house. The bank having asked for security, J. B. S. deposited with them the scrip of the shares and the lease of the house. The bank was unaware that the business of T. S. & Co. had been that of T. S., and that E. S. was carrying it on as his administratrix. An action having been brought by the younger children of T. S. against E. S., J. B. S., and the bank to administer the estate of T. S., and claiming the shares pledged to the bank as assets of T. S.: *Held* that the plaintiffs having elected to adopt

ADMINISTRATRIX—*continued.*
the trading that had been carried on, were seeking to follow the assets into property which had come to represent those assets, but that this was a mere equity, and not an equitable estate, which involves a definite lien, charge, or claim on definite property. Accordingly, in a contest of priorities, the plaintiffs' claim could not prevail against an equitable estate such as the bank had, i.e., an equitable mortgage on specific items of property. Accordingly the title of the bank to the securities was held to be good. Decision of the Court of Appeal in *In re Ffrench's Estate,* 21 L.R. Ir. 283, held by the Master of the Rolls to be binding on him, though he was of opinion that it was at variance with the decision of the House of Lords in *Shropshire Union Railways and Canal Co.* v. *The Queen,* L.R. 7 H.L. 496. *Shropshire Union Railways and Canal Co.* v. *The Queen,* L.R. 7 H.L. 496, is a clear authority that, as between two claimants, each having only an equitable interest, the first in point of time cannot be prejudiced by the fact that it was a breach of trust by his trustee which occasioned the dealing with the second in point of time. *Scott* v. *Scott and Provincial Bank of Ireland, Ltd.* M.R. 141

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—— *M'Donnell* v. *Stenson* ([1921] 1 I.R. 80), followed 72, 77
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See DONATIO MORTIS CAUSA.

COMPANY WINDING UP — FIXTURES — *Mortgagor and mortgagee — Benches and power-driven sewing machines — Sewing machines not affixed to but resting on prepared positions on benches.*] R. & B., Limited, carried on business as linen merchants in Belfast in a warehouse held under a long lease. The company went into voluntary liquidation; but previously the company's leasehold interest in the premises had become subject to an equitable charge to its bankers by assignment by way of mortgage by

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deposit of title-deeds. The top floor of the premises was fitted with benches and power-driven sewing machines, which were used in connexion with the business carried on there, and there were also the necessary shafting and power arrangements for working the machines. The benches on which the sewing machines rested were affixed to the floor by spikes or bolts, and the shafting and plant in connexion with the power arrangements were affixed to the benches or to the walls or floor of the premises. The sewing machines were not permanently affixed to the benches in any way; they merely rested on prepared positions on the benches, and were held in position by means of easily movable attachments. *Held* by the Court of Appeal N.I. (Moore L.J. and Andrews L.J.), affirming the decision of Wilson J., that the sewing machines did not pass as fixtures to the bank under the equitable mortgage. *Companies (Consolidation) Act*, 1908, *and Ross and Boal, Limited.* [APP. (N.I.) 129

COMPOUNDED ARREARS OF RENT, how estimated [52, 63, 66
See LANDLORD AND TENANT—LAND PURCHASE. 2, 3, and 4.

CONDITIONS OF SALE — ARREARS OF POOR-RATE DUE — *Land Purchase Acts — Holding sold by Land Commission for default—Irish Land Act*, 1903 (3 *Ed.* 7, *c.* 37), *sect.* 55.] A holding on which arrears of poor-rate were due was put up for sale by the Land Commission for default in payment of the purchase instalments under a condition of sale which provided that "the lands will also be sold subject to any arrears of income tax or other rates, poor-rates, county charges, taxes, and assessments to which they are liable." Sect. 55 of the Irish Land Act, 1903 (3 Ed. 7, c. 37), provides that "where a holding is put up for sale by or at the instance or with the consent of the Land Commission, the holding shall be sold subject to the purchase-annuity (if any) and any charge under any Public Works Acts, but discharged from all other claims or incumbrances of all persons whomsoever who are interested in the holding, and all such claims shall as from the date of the sale cease as against the holding and attach to the purchase-money in like manner as immediately

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before the date of the sale they attached to the holding." *Held* by the Court of Appeal (Molony C.J. and Ronan and O'Connor L.JJ.) (reversing Wylie J.), that inasmuch as poor-rate was not a charge on the holding, the condition did not contravene the provisions of sect. 55, and was binding on the purchaser. *Wakeham's Estate* APP. (I.F.S.) 53

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DEVOLUTION — Lands held pur autre vie agreed to be purchased under Land Purchase Acts ... 72, 77
See ESTATE PUR AUTRE VIE.

DOCUMENT—Inspection by Court [68
See PRACTICE—DISCOVERY.

DONATIO MORTIS CAUSA — VALIDITY—SYMBOLIC DOMINION—*Key of cash-box — Complete parting with dominion—"Stale" cheque good subject-matter of donatio mortis causa.*] Deceased lived in the house of his brother, the defendant, and shortly before his death told him to bring him a cash-box, which contained a deposit receipt and two "stale" cheques. The key of the cash-box was in the deceased's waistcoat pocket, and he opened the cash-box with it and took out the papers, saying, "Here is all belonging to me; I am sorry I have not more to give you. You were very good to me. You will do the same for me as you did for Kitty and Tom." The papers were then put back in the cash-box, which was locked by the deceased himself, who put the key back into his vest pocket. The deceased died intestate, and the defendant was granted administration of his estate. He included the deposit receipt and the two cheques in the schedule of assets of the deceased. *Held* by the Court of Appeal (Molony C.J. and O'Connor L.J., Ronan L.J. dissentiente), affirming the judgment of O'Connor M.R., that there was no valid donatio mortis causa, inasmuch as the deceased never intended to part with the actual possession of the documents in such a way as to lose dominion and control over them during his life. *In re Mulroy, M'Andrew*, v. *Mulroy* APP. (I.F.S.) 98

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ESTATE PUR AUTRE VIE — DEVOLUTION — *Agreement to purchase under Land Purchase Acts—Death of tenant before vesting—Registration of Title (Ireland) Act,* 1891 (54 & 55 *Vict. c.* 66), *sect.* 84 — *Land Law (Ireland) Act,* 1896 (59 & 60 *Vict. c.* 47), *sect.* 32.] A tenant of an estate pur autre vie agreed to purchase his holding under the Land Purchase Acts, but died before the lands had been vested or registered. The advance of the purchase-money had previously been sanctioned. *Held* by the Court of Appeal, affirming O'Connor M.R., that on the death of the tenant intestate the lands, although freehold, devolved as personalty. *M'Donnell* v. *Stenson* ([1921] 1 I.R. 80) followed. *Collins, deceased. Collins* v *Collins*
[M.R., APP. (I.F.S.) 72, 77

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HABEAS CORPUS — STATE OF WAR OR ARMED REBELLION—*Liberty of subject — Martial law — Jurisdiction of the civil Courts to determine when state of war is at an end—Constitution of the Irish Free State, Articles 6 and 47—Public Safety (Emergency Powers) Act,* 1923—*Powers of Executive Minister thereunder — Bills for the immediate preservation of the public peace — Declaration by both Houses of the Oireachtas.*] The civil Courts are bound, when their jurisdiction is invoked, to decide whether

HABEAS CORPUS—*continued.*
or not there exists a state of war or armed rebellion, but once they decide there is a state of war or armed rebellion they have no power to prohibit, control, or interfere with any act of the military forces. Article 6 of the Irish Free State Constitution is merely declaratory of the pre-existing law. The Court of Appeal on the evidence *held* that a state of war or armed rebellion did not exist in Dublin at the time of the application, and accordingly ordered a writ of habeas corpus to issue to the respondents, in whose custody Mrs. Nora O'Brien was detained. In answer to the writ the respondents certified and returned that the prisoner was detained in custody under an order of Richard Mulcahy, an Executive Minister of Saorstát Éireann, within the meaning of the Public Safety (Emergency Powers) Act, 1923, he being of opinion that the public safety would be endangered by the prisoner being set at liberty. The validity of the return was questioned on the ground that the Act enabling a Minister to make such an order had been passed only the previous day, and that the declaration by both Houses of the Oireachtas, that the Bill was necessary for the immediate preservation of the public peace or safety, required by Article 47 of the Constitution had not been made. *Held,* that the Act could not be relied upon, and that the return was no answer to the writ. *Rex (O'Brien)* v. *The Governor of the Military Interment Camp, N.D.U., and the Minister of Defence.*
[APP. (I.F.S.) 32

HIGHWAY — REPAIR — Bridge carrying public road over canal —Collapse caused by ordinary traffic—Liability of canal company — Standard of repair — Change in character and volume of ordinary traffic—6 & 7 Vict. c. civ, sects. 62, 63, 64, 65, 66. *Attorney - General (Down Co. Council)* v. *Lagan Navigation Co.* ... ... H.L. 174

HUSBAND AND WIFE — Husband in possession of lands — Husband going away—Acquisition of title by wife as against husband under Statute of Limitations ... 107, 173
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1. LANDLORD AND TENANT—LAND PURCHASE—REDEMPTION OF FEE-FARM RENT—MATTERS TO BE CONSIDERED IN FIXING PRICE—*Land Act*, 1923, (*I.F.S., No.* 42 *of* 1923), *sects.* 3, 38.] Sect. 38 of the Land Act, 1923 (No. 42 of 1923), deals with the redemption of fee-farm and certain other rents, where a parcel of untenanted land situate in a non-congested districts county is held under a fee-farm grant or lease, and the proprietor of the parcel applies to the Land Commission for an advance for the purpose of redeeming the rent; but the section does not contain any directions as to what matters are to be taken into consideration in fixing the redemption price. The grantee of a fee-farm grant contended that, the Land Act of 1923 being a Land Purchase Act, the redemption price of the fee-farm rent under sect. 38 should be arrived at by ascertaining what sum would give the grantee or tenant the appropriate reduction in his rent like any other non-judicial tenant. Wylie J. *held* that this contention was not sound. Matters to be regarded in fixing the redemption price under sect. 38 considered by Wylie J. *Clements' Estate.*
[WYLIE J. 165

2. LANDLORD AND TENANT—LAND PURCHASE — COMPOUNDED ARREARS OF RENT—*Abated rent—Land Act*, 1923 (*I.F.S., No.* 42 *of* 1923), *sects.* 19, 22.] Where, pursuant to an agreement in that behalf, a landlord has for a long period allowed an abatement off the rent in respect of money spent by the tenant on the land, the abated rent is the basis on which "compounded arrears of rent" under sect. 19 of the Land Act, 1923, are to be estimated. *Clancy* v. *Commissioners of National Education.*
[WYLIE J. 52

3. LANDLORD AND TENANT—LAND PURCHASE — COMPOUNDED ARREARS OF RENT — *Method of calculation — Land Act*, 1923 (*I.F.S., No.* 42 *of* 1923), *sect.* 19.] The amount of compounded arrears of rent under sect. 19, sub-s. 2, of the Land Act, 1923, is the actual amount of the arrears of rent due, less by 25 per cent. calculated on the amount so due. *Bryan's Estate* WYLIE J. 63

4. LANDLORD AND TENANT—LAND PURCHASE — COMPOUNDED ARREARS OF RENT—*Method of calculation—Land Act*, 1923 (*I.F.S., No.* 42 *of* 1923), *sect.* 19.] The tenant of a holding on an estate to which the Irish Land Act, 1923 (I.F.S., No. 42 of 1923), applied, on the 8th November, 1920, being the second gale day in 1920, paid £37 11s., being one year's rent, and was given a receipt for the rent due up to the 1st November, 1920. Otherwise he owed £93 17s. 6d., arrears of rent on the 1st May, 1923, being the gale day next preceding the passing of the Act. The Irish Land Commission, in the particulars of rent and arrears, appropriated the payment made by him after the second gale day in 1920 to the rent which accrued due since the first gale day in that year, and giving him credit for one-half year's rent out of the one year's rent paid by him on the 8th November, 1920, returned his arrears due on 1st May, 1923, as £75 2s. The landlord applied to amend the particulars by setting out the arrears as £93 17s. 6d. instead of £75 2s. *Held,* that the particulars were correct, and should not be amended, as the words of sect. 19, sub-s. 2, clearly enacted that any payments made by the tenant after the second gale day in 1920 should be appropriated to the rent which accrued since the first gale day in that year. *Shirley's Estate*
[WYLIE J. 66

5. LANDLORD AND TENANT—LAND PURCHASE — DEMESNE — *Farm usually occupied therewith — Land Act* (*I.F.S., No.* 42 *of* 1923), *sect.* 24, *sub-s.* 2 (*c*).] A tenant's holding, which consisted of a small demesne and of a large farm held separately, but used together, *held* to be a "holding usually occupied by a person in connexion with a demesne," within sect. 24, sub-s. 2 (*c*), of the Land Act (I.F.S.), No. 42 of 1923. *Nugent's Estate* ... WYLIE J. 96

6. LANDLORD AND TENANT—LAND PURCHASE — "TENANTED LAND"—EXCLUSION OF LETTINGS FOR TEMPORARY CONVENIENCE — *Land Law* (*Ireland*) *Act*, 1881 (44 & 45 *Vict. c.*

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49), *sect.* 58, *sub-s.* 7—*Land Act*, 1923 (*No.* 42 *of* 1923), *sects.* 24, 73, *sub-s.* 2, 79.] Sect. 73, sub-s. 2, of the Land Act, 1923 (No. 42 of 1923), provides that "the expression 'tenanted land' means land held under any contract of tenancy other than . . . a letting . . . for temporary convenience, or to meet a temporary necessity . . ." Sect. 58, sub-s. 7, of the Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49), excludes for the purpose of fair rent applications holdings let for temporary convenience or to meet a temporary necessity, provided that any such letting made after the passing of that Act shall be by contract in writing, which "shall express the purpose for which such letting is made." *Held* (affirming Wylie J.), that the exclusion of lettings for temporary convenience from the Act of 1923 is not limited as in the Act of 1881, and that a holding in fact let for temporary convenience is excluded under sect. 73, sub-s. 2, of the Act of 1923, although the purpose of such letting is not expressed in writing in the contract of tenancy. *Carleton, Owner; Coady, Tenant*
[WYLIE J., APP. (I.F.S.) 168, 170

7. LANDLORD AND TENANT — LAND PURCHASE — PROVISO IN LEASE EXCLUDING LAND ACTS — WHETHER APPLICABLE TO LAND ACT, 1923 — *Land Act*, 1923 (*No.* 42 *of* 1923), *sects.* 38, 79.] A proviso in a lease excluding the application to the demised lands of "the provisions of the Landlord and Tenant (Ireland) Act, 1870, or the Land Law (Ireland) Acts, 1881 to 1887, or any of them, or any other Act or Acts amending the same or any of them," was *held* not to exclude the application of the provisions of the Land Act, 1923, to the demised lands. *O'Reilly, Landlord; Adamson, Tenant*
[WYLIE J. 167

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LEASE — FORFEITURE — RELIEF AGAINST FORFEITURE — *Liquidation — "Lease of agricultural or pastoral land"—Sale within a year of forfeiture—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *sect.* 14, *sub-ss.* 1, 2, 6; *Conveyancing Act*, 1892 (55 & 56 *Vict. c.* 13), *sect.* 2, *sub-ss.* 2, 3.] R. F. & Co., the appellants, lessees of thirty-seven acres and a half of land in the County of Antrim, on which a factory and certain other buildings were erected, went into liquidation, and thereby incurred a forfeiture for breach of covenant in the lease. The liquidator, in order to obtain relief against the forfeiture under sect. 14, sub-ss. 1, 2, 6, of the Conveyancing Act, 1881, and sect. 2, sub-ss. 2, 3 (*a*), of the Conveyancing Act, 1892, entered into a conditional contract for sale within one year from the date of the liquidation. In an action by R. F. & Co., Ltd., claiming that the defendant was not entitled to enforce a right of forfeiture: *Held* by the Court of Appeal. N.I. (Moore and Andrews L.JJ.), affirming Wilson J., that notwithstanding the demise of the factory and machinery, the lease was a lease of agricultural land within the meaning of sect. 2, sub-s. 2, of the Conveyancing Act, 1892 (55 & 56 Vict. c. 13), and that accordingly that sub-section did not apply to the lease. *Held* also, that a sale within sect. 2, sub-s. 3 (*a*), of the Conveyancing Act, 1892, must either be completed by conveyance or be an absolute contract for sale. *Ferguson & Co.* v. *Ferguson*
[APP. (N.I.) 22

LEASE, PROVISO IN, excluding application of Land Acts — Whether Land Act, 1923, excluded 167
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MORTGAGE, EQUITABLE, made in breach of trust—Priority 141
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MORTGAGE — SALE — SUIT BY PUISNE MORTGAGEE — *Parties — Prior mortgagee not a party — Chancery (Ireland) Act,* 1867 (30 & 31 *Vict. c.* 44), *sect.* 66, *rule* 9 — *County Courts (Ireland) Orders,* 1890, *Order* 18, *rules* 21 *and* 22.] A puisne mortgagee obtained the usual decree in an equity suit in the County Court for sale in lieu of foreclosure. A first legal mortgagee, who had not been made a party either originally or by service of notice of the decree, exercised his statutory power to sell the lands after service on him of an informal cautionary notice. *Held* by the Court of Appeal, N.I. (Moore and Andrews L.JJ.), affirming the judgment of Brown J., that the legal mortgagee was entitled to sell the mortgaged property under the power of sale in his mortgage, he not being bound by the decree. *Duff* v. *Devlin*
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NEGLIGENCE OF TRUSTEE — Equitable mortgage made in breach of trust—Priority 141
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POSSESSION — Action for recovery of, by owner of registered charge on land 90
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PRACTICE — DISCOVERY — INSPECTION BY COURT — *Affidavit of documents — Privilege — Pre-existing document handed to solicitor for advice—Professional communications — R.S.C.,* 1905, *Or.* 31, *r.* 20 (2).] In an affidavit of documents defendants claimed privilege for a document described as "Memoranda or notes of deceased written in a book, and given by deceased to her solicitor in connexion with the instructions for her will." The defendants were the executors of the deceased. *Held,* that the Court was entitled under Or. 31, r. 20 (2), to inspect the document for

PRACTICE—*continued.*
the purpose of deciding on the validity of the claim of privilege; and that the document being obviously a pre-existent one, and not compiled as instructions for the solicitor, was not privileged, though handed to him for the purpose of obtaining legal advice. *Graham* v. *Bogle and Mills*
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REGISTERED CHARGE — Action for recovery of land by owner of 90
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REGISTRATION OF TITLE — Application to rectify register — Effect of mistake 107, 173
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SALE by legal mortgagee after decree in suit by puisne mortgagee 56
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SALE OF GOODS—PASSING OF PROPERTY — *Payment by instalments — "Usual shipbuilding agreement"— Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *sect.* 4, *sub-s.* 1, *sects.* 16, 18, *rule* 5 — *Admissibility of parol evidence — Written documents not intended to record all the terms of contract.*] The O. S. & E. Company, Ltd., a firm of shipbuilders carrying on business at Larne, County Antrim, agreed to build a dredger hopper barge for the plaintiffs, according to certain terms. On 14th August, 1919, the plaintiffs verbally gave the O. S. & E. Co., Ltd., the order for building the dredger at price of £11,000; a rough specification was produced, and it was arranged that a full specification should afterwards be made, and that the dredger was to be built according to the terms of "the usual shipbuilding agreement." On the same day a letter was subsequently written to the O. S. & E. Co., in which the plaintiffs stated: "We confirm order given you to-day to build a dredger hopper barge," &c. Instalments of the price were paid by the plaintiffs at various stages of construction, but before the dredger was fully completed the company went into liquidation, and a receiver on behalf of the debenture holders took possession of the dredger. *Held* by Wilson J., that parol evidence was admissible to prove the real contract between the parties, and that, on the first instalment being paid, the property in the portion then finished

SALE OF GOODS—*continued.*
became, by virtue of the contract, vested in the plaintiffs, and that material subsequently added became, as it was added, the property of the plaintiffs. *Howden Brothers, Ltd.*, v. *Ulster Bank, Ltd., and Hugh Boyd and the Olderfleet Shipbuilding and Engineering Co., Ltd.*
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SETTLED LAND — SALE OR EXCHANGE — *Shifting use — Validity of condition — Statute of Limitations — Rule against perpetuities — Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *sect.* 51.] A testator devised his S. estate upon trusts, and by his will directed that if the person or any of his sons or their issue entitled to the estates limited by the said trusts should "sell or exchange or concur in or consent to the sale or exchange of all or any part or parts of the D. estate, or any part or parts of the B. estate, the trusts of the S. estate should be void and determined, and that the S. estate should then become vested in Viscount Gormanston absolutely." The tenant for life of the S. estate entered into agreements with the tenants for the sale of that estate, the agreements being dated 1st May, 1908, and on the 1st November, 1908, as tenant for life (under settlement) of the B. estate, entered into agreements with the tenants of that estate for the sale to them of that estate under the Land Purchase Acts. These lands were not vested in the tenants until the year 1921. On a summons to determine whether, in the events that had happened, the shifting use in the testator's will had taken effect: *Held*, by Powell J., that assuming that the shifting use was founded on a valid and enforceable condition, the tenant for life of the S. estate had "consented" to the sale of the B. estate on 1st May, 1908, when the purchase agreements with the tenants of that estate were signed, and that the person entitled on the shifting clause taking effect not having made any claim to the S. estate until more than twelve years after 1st May, 1908, the claim was barred under the Statute of Limitations. *Held* by the Court of Appeal (reversing Powell J.), that the Statute of Limitations did not apply,

SETTLED LAND—*continued.*
inasmuch as the gift-over did not take effect until the sale under the Land Purchase Acts was completed in 1921 by the signing of the agreements on 1st May, 1908. *Held* also, that the condition in the will as to the operation of the shifting clause did not violate the rule against perpetuities, because a sale during the existence of a life estate in S. estate was not void, while a sale not during a life estate would be a sale in defeasance of an estate tail created by the will, and therefore destructible by a disentailing deed. *Held* further, that sect. 51 of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), making void any prohibition or limitation against exercise of powers, did not apply, and that Lord Gormanston as residuary legatee and devisee under the will was entitled to the residue of the purchase-money of the S. estate. *Bellew, deceased*; *O'Reilly* v. *Bellew*
[POWELL J.; APP. (I.F.S.) 1, 9

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SPECIFIC PERFORMANCE—COVENANT FOR RENEWAL OF LEASE — *Right of lessees to renew lease although a prior lease had been made to trustees for debenture holders.*] Lessees entered into possession of certain premises under a lease for a term of twenty-five years, which contained a covenant to give the lessees a further lease for the remainder of the lessors' term, provided that notice requiring renewal was given to the lessors at least twelve months previous to the end of the term. The lease contained a further covenant entitling the lessees to take a lease of certain other premises, should they elect to do so within six months of the execution of the original lease. Having so elected and entered into possession of these latter premises subject to a precisely similar covenant for the extension of the lease, and Moore and Andrews L.JJ. (affirming Wilson J.) having held that the lessees were entitled to new leases for the residue of the terms of the lessors in the premises (*Bernard Hughes, Ltd.*, v. *Hughes, Dickson, & Co., Ltd.*, [1923] 1 I.R. 121), the lessees now sought specific performance of the covenants to renew contained in these two leases. *Held* by Wilson J., that the lessees were entitled to have these covenants specifically performed, notwithstanding the existence of a prior debenture trust deed demising the premises for the unexpired residue of the term to

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trustees for the debenture holders of the company, the lessees agreeing to take such title as the lessors could give them. *Hughes, Dickson, & Co., Ltd.*, v. *Bernard Hughes, Ltd.*
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STATUTE OF LIMITATIONS — HUSBAND AND WIFE — HUSBAND IN POSSESSION OF LANDS AS TENANT — *Husband going away and wife remaining in possession—Acquisition of title by wife as against husband under Statute of Limitations—Real Property Limitation Act*, 1833 (3 & 4 *Wm.* 4, *c.* 27), *sect.* 7—*Position of wife under the Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *sects.* 1, 2, 12 — *Wife's title registered "free from equities"—Application to rectify register—Register conclusive evidence of title—Effect of mistake in law as distinguished from mistake of fact in registering title — Local Registration of Title* (*Ir.*) *Act*, 1891 (54 & 55 *Vict. c* 66), *sects.* 29, 30, 34, 92, 93.] K., who was tenant of a farm of land, having quarrelled with his wife, left the farm in November, 1897. His wife remained in sole possession of the farm up to the time of her death in 1923. With the exception of two letters written to his wife after leaving the farm, in one of which he stated he was going abroad (though he did not do so), K. had no communication with his wife, and never returned to the farm during his wife's lifetime. After her death he claimed to be beneficially entitled to the farm (which his wife had purchased under the Land Purchase Acts), and sought a declaration that his wife's executor held the farm as trustee for him. *Held*, that the wife had acquired a title to the land under the Statute of Limitations, the evidence being conclusive as to her exclusive possession and full beneficial enjoyment. Sect. 1 of the Married Women's Property Act, 1882, enables a wife to acquire, even as against her husband, a title to land. The wife having been recognised as tenant by the landlord, entered into an agreement in November, 1906, with the landlord to purchase the holding under the Land Purchase Acts, and in August, 1909, the holding was vested in her, and in November, 1909, she was registered under the Local Registration of Title (Ir.) Act, 1891, as owner in fee-simple, "subject to equities." In November, 1919, she applied to the Land Re-

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gistry to discharge the equities, and, the facts having been placed before the Examiner, he decided that her title under the Statute of Limitations was proved, and accordingly the note as to rights and equities was cancelled. *Held*, that under sect. 34 of the Local Registration of Title (Ir.) Act, 1891, the register was conclusive evidence of the title of the owner to the land, and, although the Court has jurisdiction on the ground of actual fraud or mistake to direct the register to be rectified, no fraud had been alleged, and the Examiner had not made any mistake. And even if a mistake had been made by the Examiner, it would not have been a mistake of fact, but in the application of the law by the registering authority, and in such a case the remedy would not lie by rectification under sect. 34, but in an application for indemnity out of the insurance fund provided by sects. 92 and 93. *Keelan* v. *Garvey*
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VENDOR AND PURCHASER — SPECIFIC PERFORMANCE — MEMORANDUM IN WRITING — *Contract — Signature of agent lawfully authorised — Statute of Frauds* (7 *Wm.* 3 (*Ir.*), *c.* 12), *sect.* 2.] B., the plaintiff's agent, agreed verbally with R. to sell to R. certain freehold lands for the sum of £10,000. No formal agreement was entered into, but R. entrusted to his solicitor M. the carrying out of the contract. On the day this agreement was made the vendor's solicitor wrote to the purchaser's solicitor: "B. informs me that he has agreed with R. for the sale to him of his holding ... in fee-simple for the sum of £10,000. Under these circumstances we think it would be possible to reasonably limit the title." On the next day the purchaser's solicitor, in acknowledging the letter, stated: "The simple agreement arrived at herein appears in the first part of your letter, and I suggest that we can dispense with any further agreement." *Held*, affirming the judgment of the Master of the Rolls ([1923] 1 I.R. 127), Ronan L.J. dissenting, that the writing of this letter was within the general scope of the authority conferred on M., and that it constituted a note or memorandum signed by R.'s agent, lawfully authorised, sufficient to satisfy the Statute of Frauds, although M. had not been specifically authorised to sign

VENDOR AND PURCHASER—*con.* such a memorandum, and in writing the letter had no intention to sign one. Per O'Connor L.J.: If in pursuance of the authority entrusted to him a solicitor has to sign something which if signed by his client would be a note or memorandum within the Statute of Frauds, the client is as much bound by the solicitor's signature as if it were his own. *Cloncurry* (*Lord*) v. *Laffan* [APP. (I.F.S.) 78

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WILL — CONSTRUCTION — *Real estate —Personalty—Separate dispositions— "Residuary legatee" — Residuary clause—Whether effective to carry real estate — Meaning of the word "property."*] A testatrix devised real estate to T. F. for life, with successive estates tail to his sons, charged with certain annuities and jointures, and with an ultimate remainder to the use of T. F., his heirs, and assigns for ever. She then disposed of her personal estate, out of which she directed debts and legacies to be paid. Her will concluded: "I leave all the residue and remainder of my property after payment of my debts, legacies, and funeral and testamentary expenses" to T. F. and M. W., and she appointed them residuary legatees and executors. By a codicil she appointed A. F. and W. M. her executors and residuary legatees in the place of T. F. and M. W. T. F. died in the lifetime of the testatrix, and upon the death without issue of H. W., one of the devisees to whom a life estate was limited by the will, all the successive estates tail had been exhausted. The question then arose as to whether the provision in the codicil appointing A. F. and W. M. executors and residuary legatees in the place of T. F. and M. W. was sufficient to carry the real estate left undisposed of by the will: *Held* by the Court of Appeal (Molony C.J. and O'Connor L.J.; Ronan L.J. dissentiente), reversing Wylie J., that the residuary clause in the will did not carry the real estate, inasmuch as (1) the will showed a clear division between real and personal property, and made a complete disposition of each, and used appropriate words exclusively for the gifts of each; (2) testatrix had no real estate other than that of which the will contained complete dispositions under which T. F., if he survived testatrix, would, on failure of

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the previous estates, become absolutely entitled in fee to the whole; whereas, if the residuary clause carried the real estate, he would only have been entitled to a moiety; and (3) the will showed that the word "property" in the residuary clause was limited by its context to personal estate by reason, amongst other things, of the facts that the annuities were charged only on the real estate, and that the debts and legacies were specifically declared in the first instance to be payable out of the personal estate, and that the residue referred to the residuary clause was, not the property charged with the annuities, but the property which remained after payment of the debts and legacies, i.e., personal estate, upon which these were specifically charged. Accordingly, the appointment of A.F. and W.M. residuary legatees in the codicil in the place of T. F. and M.W. did not carry the undisposed of realty. *Fetherstonhaugh - Whitney's Estate and the Trusts of the Will of Elizabeth Westby* APP. (I.F.S.) 153

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